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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 64, Orig.

STATE OF NEW HAMPSHIRE,
Plaintiff

v.

STATE OF MAINE,
Defendant

REPORT OF TOM C. CLARK
SPECIAL MASTER

October 8, 1975

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*Although not reproduced here, the Appendices are identified. The Appendices are filed with the Clerk, U. S. Supreme Court.

REPORT OF THE SPECIAL MASTER

No. 64, Orig.

State of New Hampshire, Plaintiff, *v.* State of Maine.	On Bill of Complaint.

[October 8, 1975]

Mr. Justice Clark.

This case was brought under the original jurisdiction of the Supreme Court [1] by the State of New Hampshire to fix the location of the lateral marine boundary between it and the State of Maine in the area of the Atlantic Ocean lying between the mouth of Portsmouth Harbor and the entrance to Gosport Harbor in the Isles of Shoals. A motion for leave to file a complaint against the State of Maine was filed with the Supreme Court on June 6, 1973, and was granted on October 9, 1973. 414 U. S. 810. The matter was referred for a report of the Special Master on November 5, 1973, 414 U. S. 996. This Report is the result of that referral.

Pretrial proceedings were held in April of 1974 to narrow the issues in preparation for a trial initially scheduled to commence August 12, 1974. Between April and the scheduled trial date, however, the Attorneys General of both States, at the urging of the Special Master, reached a tentative settlement of the dispute. The parties thereupon submitted the results of the negotiations to the Special Master in the

[1] Article III, § 2 of the Constitution provides that: "The judicial Power shall extend . . . to Controversies between two or more States . . . in all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." See 28 U. S. C. § 1251 (a)(1).

form of a motion for entry of judgment by consent of the plaintiff and defendant on September 23, 1974. Three days previously, however, the New Hampshire Commercial Fishermen's Association filed a motion for permission to intervene in the case with the Supreme Court, which was referred to the Special Master. Opposition papers were filed by the States, and following a hearing on December 16, 1974, the motion was denied by the Special Master, to which the Association excepted. At the hearing, the Association was permitted to proceed as *amici curiae* and since that time it has done so, filing briefs on the legal and factual matters at issue in this dispute, as have both of the States.

On February 27, 1975, a Stipulation Regarding Record was filed by the States which incorporated in the Record "for decision of this action" the following items: (1) "Summary Memorandum on Lateral Maritime Boundary between the State of Maine and the State of New Hampshire" by Professor William S. Barnes; (2) "Memorandum on the Mouth of the Piscataqua River" by Dr. Carl Bowin; (3) a copy of Chart No. 211, Cape Neddick Harbor to Isles of Shoals, by the U. S. Coast and Geodetic Survey, 8th Edition; (4) two U. S. Geological Survey Maps, "Kittery, Me.—N. H. Quadrangle" (1956 ed.; phot.-revised 1973), and "Isles of Shoals, Me.—N. H. Quadrangle" (1956 edition); (5) all statements in the pleadings, briefs, memoranda and pretrial submissions" which have not been denied or controverted"; and (6) a copy of the King's Order in Council of April 9, 1740, setting the boundary between the Provinces of New Hampshire and Massachusetts Bay. It was agreed, further, that judicial knowledge may be taken of "all official maps, the published state papers of either State including maps incorporated therein, works of history of apparent authenticity and repute, government publications both federal and state, and ancient historical documents and maps if in published form and apparently authentic." In addition, the

parties agreed that, if a hypothetical boundary line was drawn from the mouth of the Piscataqua Harbor across the sea to the mouth of the Gosport Harbor (Isles of Shoals), strictly in accordance with the "equidistant principle," see Art. 12, Geneva Convention of the Territorial Sea and Continuous Zone (1958), excluding all reference to "special circumstances," the line would be "a zigzag line changing course at least 4 times and . . . extremely inconvenient and unworkable."

Upon the filing of final briefs, the proposed consent decree as well as the case as a whole was taken under submission on March 17, 1975, without argument. The Special Master has concluded that the proposed consent decree should be submitted to the Court for its consideration. The Special Master has concluded, however, that under *Vermont* v. *New York*, 417 U. S. 270 (1974), the proposed decree must be rejected because it constitutes "mere settlements by the parties acting under compulsions and motives that have no relation to performance of [the Court's] Article III functions." *Id.*, at 277. It is true, and the Special Master finds, that a case or controversy did exist at the time of the filing of the suit. The matter, however, was settled and compromised, perhaps because of the practical difficulties attendant upon enactment of an interstate compact under Art. I, § 10, cl. 3, of the Constitution or because of the political uncertainties of relying on a mere executive agreement settling the dispute.[2] At this point in time, however, the moving papers do not propose a case or controversy in which

[2] In this regard, it should be noted that the New Hampshire Legislature does not support the efforts of the state executive branch. The legislature adopted House Concurrent Resolution No. 4 by substantial majorities in both Houses early in 1975. Though apparently lacking the force of law (see New Hampshire Constitution, Part Second, Articles 44 and 45), the resolution expresses the legislature's support of a marine boundary line substantially different from that in the proposed consent decree and endorses the position of the *amici curiae* in this case opposing the tentative settlement.

the Court might apply "principles of law or equity to facts, distilled by hearings or stipulations." *Ibid.* The Special Master recommends therefore that the consent decree be rejected. If the Court concludes that the Special Master is in error in this regard, then the consent decree should be entered.

In the event the Court decides that the proposed consent decree cannot be entered, the dispute submitted to the Court and referred by it to the Special Master can be resolved on the stipulated record now before the Special Master, without further evidentiary hearings.[3] Accordingly, the Special Master recommends that the

[3] It is not at all strange that no additional evidentiary proceedings are deemed necesary. No two boundary delimitation proceedings can ever be alike, and, as will be pointed out in the text below, the circumstances of this dispute are relatively clear and its solution is simple. It has none of the singularities, for example, that marked the Michigan-Wisconsin boundary case earlier this century, 270 U. S. 295 (1926): 295 U. S. 455 (1935), and called forth exertions of the Special Master there which were admiringly described as follows:

"The Special Master, accompanied by counsel for Michigan and for Wisconsin, went in a large boat to the boundary sites claimed by Michigan and by Wisconsin. In various ports . . . , he took the testimony of fishermen who had received the questionnaire [distributed by the parties] and indicated that they were informed concerning the matters in controversy, as well as the testimony of other witnesses admirably selected geographically. . . . You will observe that the whole shore of the disputed waters in Green Bay produced witnesses familiar with all the area under consideration except St. Martin Island where no one lives except four lightkeepers. Legal field work! Would that their were more of it in litigation where geography plays a part!"

Martin, "The Second Wisconsin-Michigan Boundary Case in the Supreme Court of the United States, 1932–1936," 28 Annals of the Assoc. of Am. Geographers 77, 78 (1938).

Here, the parties have stipulated to the making of a record which quite sufficiently provides a basis on which the boundary between the States is easily determinable. Neither the parties in their original pleadings nor *amicus curiae* in its independent submissions have raised issues which require further evidentiary inquiry.

following recommendations and report be adopted and the report's proposed boundary line be established.

1. Background of the Complaint.

The case is known in the press as "the lobster war" and at issue are some 2,500 acres of hard, rocky sea bottom—prime fishing waters for lobsters—located between the Harbors of Portsmouth on the mainland and Gosport on the Isles of Shoals. The controversy may well have been sparked by the continuing decrease in the size of the New England lobster catch in recent years.[4]

Maine prohibits the taking of lobsters or crabs in Maine waters without a license—which is available only to Maine residents, 12 Maine Rev. Stat. Ann. § 4404.[5] In addition, Maine imposes stricter minimum and maximum size requirements than New Hampshire. Compare 12 Maine Rev. Stat. Ann. § 4451 (1) (no less than $3^{3}/_{16}''$) and § 4451 (2) (no greater than $5''$) with New Hampshire Rev. Stat. Ann. 211:27 (no less than $3^{1}/_{8}''$; no maximum size). Other Maine statutes, for example, relative to the permissible number of lobster traps, are also more restrictive than New Hampshire lobstering

[4] It has been noted by one court that:

"[T]he Maine lobster industry is facing an imminent crisis. The uncontroverted record discloses that in recent years a combination of increased fishing pressure and a decline in sea temperature have substantially depleted the supply of lobsters, and that unless fishing pressure is drastically diminished, the supply may in the near future be reduced to the point where it will be impossible to maintain reasonable yields." *Massey* v. *Apollonio*, 387 F. Supp. 373, 376 n. 5 (Me. 1974).

[5] A three-judge district court recently struck down Maine's three-year durational residence requirement for a lobster fishing license as violative of equal protection. *Massey* v. *Apollonio*, 387 F. Supp. 373 (Me. 1974). Since plaintiff was a bona fide Maine resident, the Court, however, did not reach the question of whether the limitation of lobster fishing licenses to Maine residents impinges upon any constitutional rights of nonresidents. 387 F. Supp., at 374 n. 2.

laws, see 12 Maine Rev. Stat. Ann. §§ 4402, 4403, 4454, 4455, 4459, and 4460.

Following an informal executive agreement in 1970, an effort was undertaken in 1971 to settle the boundary dispute through the legislative process, and an interstate boundary commission containing representatives of each State was established, see New Hampshire Session Laws of 1971, c. 429, and Maine Session Laws of 1971, c. 131. Theoretically, the commissioners were to produce boundaries by mutual agreement, submit them to their respective state legislatures for approval, and then forward them to the United States Congress for acceptance as an interstate compact. Unfortunately, after protracted negotiations, the boundary commissioners reached no agreement, and subsequent events took matters out of their hands.

In 1973, there began a series of "border incidents" which appeared to threaten actual violence between the States. On January 18, 1973, a Dover, N. H., lobsterman named Edward Heaphy was arrested by Maine coastal wardens in open water and charged with taking lobsters illegally from Maine waters; he claimed to have been fishing in New Hampshire's portion of the disputed area.[6] Tempers ran high, and on May 23, 1973, another New Hampshire lobsterman, Edward Capone, was arrested by Maine wardens patrolling the disputed area. An effort to seize his boat was forestalled only by the intervention of a district chief of the New Hampshire fish and game department. See Portland (Me.) Press, May 24, 1973, at 1, col. 1. It was reported that, when news of this arrest was conveyed to the Governor of New Hampshire, he interrupted a session of his executive council to announce that "Apparently Maine has declared war on us." See Manchester Union Leader, May 24, 1973, at 10, col. 5. On the night following the arrest of Capone, the State of Maine filed a § 1983 action in Federal District Court seeking to enjoin New Hampshire Governor Thomson from carrying out his "threats" to enforce the lights-on-range line and to "retaliate promptly" if Maine lobstermen fished in the disputed waters. Federal District Court judges from the two States, attending the annual First Circuit Judicial Conference on New Castle Island, N. H., held an immediate, informal hearing on the complaint that night. One judge suggested that the matter was basically a boundary dispute, not a dispute over regulations and not a § 1983 problem. The hearing was adjourned after the parties agreed to a temporary halt in enforcement activities while the States submitted the case to the Supreme Court. Shortly thereafter, Maine moved to dismiss that complaint voluntarily. See *Lund* v. *Thomson*, No. 14–41 (Me., dismissed June 14, 1973). Further boundary negotiations were abandoned.

A bill was pushed through the New Hampshire Legislature claiming a line that took in all of the disputed territory and that swept some 200 miles out to sea. New Hampshire Rev. Stat. Ann. 1:15; New Hampshire Session Laws of 1973, 580. This asserted boundary—known as the "lights on range" line since it is an extension to the mouth of Gosport Harbor of a line connecting Fort Point Light and Whaleback Light within Portsmouth Harbor—represented the extreme of New Hampshire's claims and found support in the apparent custom of New Hampshire lobstermen to navigate to and from Portsmouth Harbor along that line. See U. S. C. & G. S. Chart 211, attached as Appendix A to this report. At its own extreme, the State of Maine in its Answer filed in the Supreme Court relied on a boundary determination by King George II of England in 1740 which they interpreted as a line following the midchannel of Ports-

[6] Heaphy subsequently filed a complaint in the United States District Court for the District of Maine, charging various Maine officials with a violation of 42 U. S. C. § 1981 *et seq.* Application for a temporary restraining order was denied on June 15, 1973. See *Heaphy* v. *Apollonio et al.*, No. 14–44 (Me., filed June 15, 1973). No further proceedings have taken place in this matter.

mouth Harbor and extended seawards until it is intersected at a point about one and one-half miles south of Gunboat Shoal buoy by a straight line following the midchannel of Gosport Harbor and projected in a westerly direction. Comparing Maine's L-shaped line with New Hampshire's "lights on range" line, one notes an area in dispute totalling some 5,000 acres.

Later, in its complaint before the Supreme Court, New Hampshire modified its claim to take into account the 1740 decree and asserted a line drawn between the westerly most tips of Appledore Island and Star Island in Gosport Harbor. Maine, as an alternative position, claimed a line somewhat closer to New Hampshire's. This line—originating in a 1920 map produced by the United States Geological Survey, Maine-New Hampshire/York Quadrangle, No. 4300–W 7030/15—appears as something in the nature of a 160° "dog-leg" connecting the two harbors. The difference between these alternative claims amounts to approximately 3,200 acres of disputed seabed, and it was a compromise of these two positions that the proposed consent decree sought to achieve. Let us now turn to a review of the historical background of the two States for guidance in locating the correct boundaries.

2. Historical Events Affecting the Boundary.

It was on March 3, 1614, that Captain John Smith set sail from a roadstead in the English Channel, bound west for the coast of "New England, a parte of Ameryca." His mind was on whales and gold and copper, but he acknowledged that "If those failed, Fish and Furres was then our refuge." [7] It so happened that Smith got neither, but fish did prove to be the true wealth of New England and fish it is that lies at the heart of this dispute. Smith, however, was a remarkably observant

[7] J. Smith, A Description of New-England (Veazie reprint of the edition of 1616), at 19.

man which led him to draw and publish some of the first maps of the New England coast, maps read eagerly by Sir Ferdinando Gorges, who was to play a central role in the history of that area. Like many cartographers over the next century, Smith drew beautifully but inaccurately, and boundaries based on such maps resemble the later office survey in Texas whose "calls" seldom met on the ground. Theirs was a legacy of imprecision that haunts us today.

Smith, of course was not the first Englishman to tread the shores of New England. Sir John Cabot, a naturalized Venetian who sailed for King Henry VII, is reputed to have sighted the coast of Maine during his second voyage in 1498, though he thought that he had discovered the "territory of the Grand Khan of China." [8] Then came the two failures of John Hawkins in 1567, and the unsuccessful attempt of Sir Humphrey Gilbert to colonize Newfoundland in 1583. For some years thereafter, English efforts were made under the leadership of Sir Walter Raleigh, Gilbert's half brother, whose interest was far to the south of New England.[9]

It remained for two lesser known names to be the first Englishmen to set foot on Maine soil, Bartholomew Gosnold in 1602 and Martin Prinz in 1603. They awakened the interest of four high-ranking Englishmen: Henry Wristhesley, the Earl of Southampton; his son-in-law, Thomas Arundell; Sir Ferdinando Gorges, Commander of the fortifications at Plymouth, England; and Sir John Popham, Lord Chief Justice of England. In 1605, they commissioned George Weymouth to sail to Maine, and he returned with five captive Indians, three of whom he gave to Gorges and the remaining two to the Lord Chief Justice. Gorges was so entranced by their presence that he stated: "This accident must be

[8] H. Burrage, The Beginnings of Colonial Maine (1914), at 5.
[9] L. Hatch, ed. Maine: A History (1919), Vol. I, at 4.

acknowledged the meanes under God of putting on foote, and giving life to all our Plantations."[10]

In the next year, on the application of the Lord Chief Justice and others,[11] the King granted a royal charter to each of two companies, The London Company and the Plymouth Company, awarding them all the territory in North America between present day North Carolina and the southern half of Maine. The London Company was granted territory between the 34th and 41st degrees of latitude north, and the Plymouth Company, which included Popham and Gorges, received the area between the 38th and 45th degrees, providing, however, "[t]hat the plantation and habitation of such of said colonies, as shall plant themselves as aforesaid, shall not be made within one hundred English miles of the other of them that first began to make their plantation aforesaid."[12]

The London Company elected immediately to establish a colony in South Virginia at Jamestown, but the Plym-

[10] J. Baxter, "Memoir of Sir Ferdinando Gorges," Sir Ferdinando Gorges and his Province of Maine (1890), Vol. I, at 68.

[11] Burrage, *supra*, at 51, 55. Burrage adds that:

"Evidently [Popham] saw very clearly the importance of government control in opening to English colonization the vast territory of the new world . . . . Private plantations had not been successful, and Sir John Popham, and those who agreed with him, had good reasons for their belief that public plantations had the best prospect of success. The Popham idea prevailed, and brought to an end private enterprises on the part of English adventurers like Sir John Zouche, who were ready to seize and to hold as much of American territory as they could secure." *Id.*, at 55–56.

Upon Weymouth's return, Zouche had hurriedly contacted the adventurer and, on October 30, 1605, concluded an agreement with Weymouth to lead another expedition back to the New World. The famous Guy Fawkes' gunpowder plot of November 5th, however, threw the country into such an uproar that time slipped away, and Zouche's efforts were pre-empted by the royal charter to Popham's associates in April of 1606. *Id.*, at 53–54.

[12] 7 Thorpe, Federal and State Constitutions (1909), at 3783 *et seq.*

outh Company waited and later mounted an expedition to North Virginia, with two ships, one under Raleigh Gilbert, son of Sir Humphrey, and the other under George Popham, the Lord Chief Justice's nephew. The Gilbert-Popham expedition was unsuccessful and was abandoned in 1608. Gorges commented in this regard, "All our former hopes were frozen to death."[13] Yet hope sprang eternal, and another attempt to colonize by Thomas Dermer was initiated by Gorges and the Plymouth Company in 1620. But it too failed.

The success of The London Company to the south in Jamestown pointed up the Plymouth Company's failures and made it clear to Gorges who was firmly committed to colonization of the New World, that reorganization was called for. Accordingly, Gorges along with Plymouth Company associates, sought from King James a rechartering of their venture, and an enlargement of their powers and rights pertaining thereto, similar to that granted to The London Company in 1609.[14] Notwithstanding the understandable opposition of the latter company which desired to protect its temporary advantage, a new charter, known as the "Great Patent of New England" was issued by the King on November 3, 1620, to the Gorges group which restyled itself the Council of New England. The charter altered the original boundaries of the colony and the area described as follows:

> "[A]ll that Circuit, Continent, Precincts, and Limitts in America, lying and being in Breadth from Fourty Degrees of Northerly Latitude, from the equnoctial [*sic*] Line, to Fourty-eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Maine

[13] Gorges, "A Description of New-England," in Baxter, *supra*, vol. II, at 17.

[14] See 7 Thorpe, Federal and State Constitutions (1909), at 3790 *et seq.*

> Land, from Sea to Sea, with all the Seas, Rivers, Islands, Creekes, Inletts, Ports, and Havens, within the Degrees, Precincts, and Limitts of the said Latitude and Longitude, shall be the Limitts, and Bounds, and Precincts of the second [*i. e.*, North] Collony [*sic*]:
>
> "And to the End that the said Territoryes may forever hereafter be more particularly and certainly known and distinguished, our Will and Pleasure is, that same shall from henceforth be nominated, termed, and called by the Name of New-England, in America . . . ." [15]

Moreover, the charter specifically granted to the Council control over "Fishings . . . both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining." [16] And this part of the charter aroused strong opposition in Parliament, not only among the supporters of The London Company, but also among those representing England's fishing industry. This latter group—merchants in Plymouth, Bristol, and other seacoast towns unassociated with the Plymouth Company—had been engaged in a lucrative fishing enterprise off the coast of Maine for some years and, quite rightly, feared the added cost if such a monopoly were granted. Sensitive to the economic interest of their fisherman-constituents—much as the New Hampshire Legislature in the present case—Parliament found yet another issue to consider in its running battle with the Stuart king—a stout asserter of royal prerogatives. In April of 1621, an act was introduced to permit free and open fishing off the coasts of Virginia and New England, and the controversy continued as a major grievance between the monarch and the legislature for more than three years. Twice the House of Commons passed a free fishing bill,

[15] 3 Thorpe, Federal and State Constitutions (1909), at 1829.
[16] *Id.*, at 1834.

but on neither occasion did the House of Lords sustain the measure, and a direct petition to the King for a modification of the patent to the Council of New England was ignored. Nevertheless, Gorges, who had been periodically haled before Sir Edward Coke's grievance committee regarding this matter, felt sufficiently wearied by Parliament's continued efforts to informally promise to refrain from enforcing his fishing monopoly in New England, and, in that way, the issue was peacefully, if not definitively, resolved in the Spring of 1624.[17]

Throughout this period of dispute, it should be emphasized, the Council of New England was making specific grants of land to various individuals and groups in the area of present-day Maine and New Hampshire, though little in the way of colonization was taking place. Among these grants were several of significance [18] but of chief concern to this litigation is a grant of territory between the Merrimac and Kennebec rivers, made to Gorges and Captain John Mason [19] on August 10, 1622. Heartened by the success of the Pilgrim colony at "New Plymouth," and aided by his new partner, Gorges en-

[17] Burrage, *supra*, at 144–159.

[18] Of particular interest was the Council's first patent which amounted to little more than ratification of a *fait accompli:* the founding of the "Pilgrim" colony by those who had voyaged in the Mayflower in 1620. This group, which had originally obtained a grant of territory at the mouth of the Hudson River from the London Company, were led off course, perhaps at the instigation of Gorges, see Baxter, *supra*, vol. II, at 47 n. 340 and settled within the territorial limits of the Council. Baxter, *supra*, vol. I, at 112–113. On June 1, 1621, the Council for New England, eager to acquire such pious and hardworking colonists, promptly issued a patent to "John Pierce and his associates." *Id.*, at 120.

[19] Mason had spent several years as Governor of Newfoundland, see generally J. Dean, ed. Captain John Mason (1887), and on his return to England "was naturally the subject of attention from persons desirous to profit by his experience." Baxter, *supra*, vol. I, at 123. He met Gorges who quickly found in him "a promising helper, a man of sound judgment and full of energy." *Id.*, at 124.

deavored once again to launch a permanent trading colony and to recoup finally on his years of investment and effort. Towards this end, the council granted territory to Gorges and Mason, which they intended to call the Province of Maine, as follows:

> "[A]ll that pa[r]t of the main land in New-England lying upon the sea-coast betwixt ye rivers of Merrimack and Sagadahock [*i. e.*, Kennebec], and to the furthest heads of the said rivers, and soe forwards up into the land westward until three-score miles be finished from ye first entrance of the aforesaid rivers, and halfway over; that is to say, to the midst of the said two rivers wch bounds and limitts the land aforesaid together with all the lands and isletts within five leagues distance of ye premises and abutting upon ye same or any part or parcell thereof." [20]

Roughly halfway between the Merrimack and Kennebec Rivers named in this grant to Gorges and Mason is the Piscataqua (or Passataquack) River, once described by Captain John Smith as a convenient harbor "for small barks." [21] Along that river—on the site now known as Odiorne's Point—a Scotsman named David Thompson (or Thomson) established in the Spring of 1623 the first important settlement in the presently disputed area. The histories are in agreement as to the location of his settlement on Odiorne's Point and uniformly characterize it as being at the mouth of the Piscataqua.[22] Although Thompson eventually left this site and resettled on a small island in Boston harbor, the large stone house that

[20] 3 Thorpe, Federal and State Constitution (1909), at 1622–1623.

[21] J. Smith, A Descripton of New England (Veazie reprint, 1865), at 43.

[22] See J. Belknap, The History of New Hampshire (1831), Vol. I, at 4; J. Jenness, Notes on the First Planting of New Hampshire (1878), at 4; Baxter, *supra*, vol. I, at 153–154; Burrage, supra, at 169.

he built continued to be used by agents of Gorges and Mason for some years thereafter.[23] Poltical events in England, however, conspired to deny historical significance and success to Gorges' efforts at colonization.

As was mentioned before, Parliament considered the grant of New England from the Council at Plymouth as a public grievance, and consequently the interest of many possible investors had been chilled. To make matters worse, the crown cooled markedly towards development of New England as a result of Prince Charles' romance with Henrietta, a sister of the King of France, who had rival interests in American territory.[24] Within a matter of weeks following the death of James I on March 27, 1625, Charles married the French princess, and a peculiar two-year period of detente with France followed.[25] It was short-lived, however, and, as hostilities between the countries resumed, settlement of the New World was

[23] Belknap, *supra*, at 5–6; Jenness, *supra*, at 6–7. For example, Captain Christopher Levett, sent by Gorges and Mason in late 1623 to make another attempt at colonization, landed at Odiorne's Point and stayed for about a month before passing on up the coast. Levett left a record of his explorations, included this comment on the Isle of Shoals, which he identified as the first place he set foot upon in New England:

"Upon these islands, I neither could see one good timber tree, nor so much good ground as to make a garden." J. Baxter, Christopher Levett of York (1893), at 89.

[24] Prince Charles, in fastening upon Henrietta, abruptly left off his wooing of the daughter of Philip III, the King of Spain, thus precipitating once again a state of hostility between England and Spain, which itself distracted Gorges who was still Commander of the fortifications at Plymouth. Baxter, *supra*, vol. I, at 133–135.

[25] One bizarre episode in the summer of 1625 during this period of family alliance was England's provision of a fleet to help the French King subdue the Protestant defenders of Rochelle. One of Gorges' merchant ships was armed and ordered to aid in this activity, but he eventually withdrew from the operation in part out of distaste for the mission and in part because the French refused to pledge security for the value of his ship. Baxter, *supra*, vol. I, at 137–144.

again encouraged.[26] Grants by the Plymouth Council to individuals or small groups of potential colonists began to multiply, but with little attention to the problems of overlapping boundaries, unfortunately. One of the most important of these was to a group led by Sir Henry Roswell "to afford an asylum for persons who were under a ban for nonconformity" [27] in the so-called Massachusetts Bay area.

On March 19, 1628, the Council granted the land between the Merrimack and Charles Rivers to the Massachusetts Bay Company, and this grant was independently confirmed by royal charter on March 4, 1629.[28] Though little significance was attached to that event at the time, Gorges' extensive possessions would eventually be swallowed by this vigorous corporation, for Gorges was strongly royalist in an era when destiny was running in the opposite direction. In 1629, however, that denouement was still a score of years away, and one step—indispensible to the present dispute—had yet to be taken.

In the latter part of 1629, with the war against France and Spain ended, Gorges and Mason turned their attention back to their colonial enterprises. Their first step was to divide in half the Province of Maine, which had been granted them in 1622, along the Piscataqua River. This was accomplished by the issuance of a new grant

[26] On February 11, 1628, Charles I issued a proclamation which emphasized the importance of protecting English interests on the coast of New England from "foreign enemies" and the discouragement faced by many adventurers, and which made the remarkable suggestion that collection be taken at the churches to support such activities. Burrage, *supra*, at 191–194. The existence of this document attests the impasse reached by King and Parliament in this running battle, since the latter would not vote funds for any of former's projects.

[27] Baxter, *supra*, vol. I, at 147.

[28] 3 Thorpe, Federal and State Constitutions (1909), at 1846 *et seq.*

from the council at Plymouth to Mason of the following territory, which he chose to call New Hampshire:

> "All that part of the Maine land in New England lying upon the sea Coaste beginning from the Middle part of Merrimack River and from thence to proceed Northwards along the Sea coaste to passcattaway [*sic*] river and from thence Northwestwards untill Threescore miles be finished from the first entrance of passcattaway river and also from Merrimacke through the said River . . . together with all Islands and Isletts within five leagues distance of the premises and abutting upon the same or any parte or parcell thereof." [29]

To Gorges was left the remainder of the original 1622 grant, which continued to be known as the Province of Maine.[30] But the hopes of both Mason and Gorges—neither of whom ever saw their possessions—were to go for naught as the practicalities of administering far-off territories caught up with them. One by one, tiny communities began to spring up all along the coast between Maine and Massachusetts. Some were established without authority from the Council at Plymouth or its grantees; [31] others without sufficient regard to definite

[29] 4 Thorpe, Federal and State Constitutions (1909), at 2434. In 1635, the council at Plymouth confirmed the grant to Mason made in 1629, but used somewhat different language, including specific langunge granting to Mason "the south half of the Isles of Shoals." 1 New Hampshire Provincial Papers (1867), at 32–33.

[30] Of some interest is the so-called Laconia patent issued by the Council at Plymouth to Gorges and Mason jointly just 10 days after the New Hampshire Grant. The Laconia Grant pertained to areas in Canada which the adventurers thought could be reached via the Piscatagua and Merrimack Rivers and which would be available since the French had supposedly just been defeated. Baxter, *supra*, vol. I, at 152–153. To insure the use of Odiorne's Point in the Piscatagua for this purpose, the Council of Plymouth regranted the area to Mason and Gorges jointly. Jenness, *supra*, at 32–36, 82–84.

[31] Burrage, *supra*, at 198–199.

boundaries.[32] Consequently, boundary disputes arose which lasted for decades. In particular, the Puritans of Massachusetts Bay, eager to claim new lands for their rapidly expanding colony, eyed the nearby Mason and Gorges grants covetously. The inability of Mason and Gorges to effectively exercise any governmental control over their possessions in the 1630s laid the groundwork for Massachusetts to take over both colonies, at least temporarily.

Mason died in 1635; Gorges lingered on until 1647. Though the King had finally granted a royal charter for the Province of Maine in 1639,[33] Gorges was too old and

[32] Baxter, *supra*, vol. I, at 154.

[33] This charter, dated April 15, 1639, is reprinted at 3 Thorpe, Federal and State Constitutions (1909), at 1625–1637. The operative grant is as follows:

"Wee . . . graunte and confirme unto the said Sir Fardinando Gorges his heires and assignes All that Parte Purparte and Porcon of the Mayne Lande of New England aforesaid beginning att the entrance of Pascataway Harbor and soe to passe upp the same into the River of Newichewanocke and through the same unto the furthest heade thereof and from thence Northwestwards till one hundred and twenty miles bee finished and from Pascataway Harbor mouth aforesaid Northeastwards along the Sea Coasts to Sagadahocke and upp the River thereof to Kynybequy River and through the same unto the heade thereof and into the Lande Northwestwards untill one hundred and twenty myles bee ended being accompted from the mouth of Sagadahocke and from the period of one hundred and twenty myles aforesaid to crosse over Lande to the one hundred and twenty myles end formerly reckoned upp into the Lande from Pascataway Harbor through Newichewanocke River and alsoe the Northe halfe of the Isles of Shoales together with the Isles of Capawock and Nawtican neere Cape Cod as alsoe all the Islands and Iletts lyeinge within five leagues of the Mayne all alonge the aforesaide Coasts betweene the aforesaid River of Pascataway and Segadahocke with all the Creekes Havens and Harbors thereunto belonginge and the Revercon and Revercons Remaynder and Remaynders of all and singular the said Landes Rivers and Premisses All which said Part Purpart or Porcon of the Mayne Lande and all and every the Premises herein before named Wee Doe for us our heires and successors create and incorporate into One Province or Countie . . . ."

poor to achieve his grandiose scheme of establishing his own palatinate.

Following Mason's death, the area degenerated into random violence and dissension, and its residents were ripe for negotiations respecting an incorporation of New Hampshire into Massachusetts. In 1639, the residents of Exeter signed an agreement to submit to the jurisdiction of Massachusetts,[34] but it was not until October 9, 1641, that a formal Act of Annexation was passed by the Massachusetts Legislature accepting the inhabitants of Piscataqua "under the Government" of the Massachusetts Bay Colony.[35] A decade later, perceiving that the province of Maine might be ready for a similar arrangement, Massachusetts tendered her protection to the nearest of the Maine settlements, Kittery. On November 20, 1652, 41 of the inhabitants of Kittery (apparently a large majority of the area's freemen) subscribed to a declaration subjecting themselves "to the government of Massachusetts bay in New England." [36] The chaos which was the legacy of Gorges' efforts to establish a proprietary colony also affected the holders of the "Plough patent," and a majority of Maine's freemen voted on July 13, 1658, to follow the lead of Kittery in submitting to the government of Massachusetts.[37] Thus by the end of the 1650s, Massachusetts controlled all of New England from Cape Code north,[38] but, though Mason and Gorges were

[34] 4 Thorpe, Federal and State Constitutions (1909), at 2445.

[35] Jenness, *supra*, at 59–60. Significantly the annexation rested solely on the claim that the New Hampshire territory lay within the original chartered limits of the Bay Colony; it made no mention whatever of the Hilton Patent (from Gorges to Edward Hilton), nor of any surrender of jurisdiction over it by its proprietors, nor of the voluntary submission of the people, "though by these means only had the Massachusetts got the control of the river." *Ibid.*

[36] Burrage, *supra*, at 375.

[37] *Id.*, at 381.

[38] In 1640, the Plymouth colony had surrendered its patent and merged with the Massachusetts Bay Colony. 3 Thorpe, Federal and State Constitutions (1909), at 1861–1862.

dead, the claims of their heirs remained to haunt the development of that area, for the days of the Commonwealth were numbered and the interests of the Royalists would again be in ascendancy.

The controversy between Massachusetts and the heirs of Mason and Gorges was given over to the Lords Chief Justices of the Courts of King's Bench and Common Pleas for resolution, and, on July 20, 1677, they delivered their opinion.[39] Massachusetts had previously disclaimed any legal title to the lands in Maine and New Hampshire, but the court declined to rule conclusively on the validity of the titles of Robert Mason and Ferdinando Gorges, the grandsons of the original grantees, on the ground that the territory was then in the possession of other individuals not before the court.

Gorges' grandson, perceiving that he had won a skirmish and not the war, despaired of ever achieving benefit from his inheritance, and sold all his rights in Maine to an *ad hoc* agent of Massachusetts named John Usher for £1,250.[40] Young Mason, however, persevered, and the King recognized an opportunity to establish the first successful royal government in New England. On September 18, 1679, the King issued a commission ordering Massachusetts to withdraw from New Hampshire, appointing one John Cutt as "president" of the province to govern with a council, and recognizing Mason's property interests in the tract.[41] Unfortunately for Mason his travails were only beginning, for those appointed by the King as president and council—with power to decide property disputes—were strongly opposed to Mason's claims.[42] Although the decree of 1679 served to establish New Hampshire as an independent entity—except for a few years during and after the unpleasantly recalled "Dominion of New England" under Sir Edmund Andros in the late 1680s[43]—Mason was never able to obtain any satisfaction from his proprietorship. Indeed, after decades of labrynthian court suits and appeals which were hopelessly inconclusive, the assembly of New Hampshire purchased the release of the whole Masonian interest for £1,000 from the great-great-great grandson of Captain Mason in 1738.[44]

Between the appointment of Cutt and the time of the Revolution, there followed a succession of provincial governors of New Hampshire and of Massachusetts, which had been formally rechartered by the King in 1691 to include the province of Maine.[45] Although the royal governor of one province was frequently appointed to serve as royal governor of the other, the provinces of Massachusetts and New Hampshire grew apart, and their interests began to clash. By the first decades of the 18th century, conflicting grants of land were being made along the border areas, and a major boundary dispute emerged regarding the Merrimack River. It was the

[39] Reprinted in Belknap, *supra*, vol. I, App., at 449–452.

[40] Baxter, *supra*, vol. II, at 173.

[41] The "Cutt Commission" is reprinted in 4 Thorpe, Federal and State Constitutions (1909), at 2446–2451.

[42] It is said regarding these appointments that "there were not in the whole province straighter Puritans or firmer friends of the Massachusetts colony. . . . They hated Mason for detaching the province from Massachusetts, and they hated his claim to the soil more." Tuttle, "Establishment of the Royal Provincial Government of New Hampshire—1680," in Laws of New Hampshire (1904), Vol. I, at 778.

[43] His commission is reprinted at 3 Thorpe, Federal and State Constitutions (1909), at 1863–1869.

[44] The history of this wondrously complicated litigation is told in Belknap, *supra*, vol. I, at 102–103, 111–115, 117, 121–124, 148–152, 157–166, 252–254.

[45] This new charter also joined to Massachusetts and Maine that part of northern New England previously granted to the Duke of York and known as "Pemaquid" which extended from the Kennebec River to the St. Croix, see 3 Thorpe, Federal and State Constitutions (1909), 1637–1644. The 1691 Charter is reprinted in 3 Thorpe, *supra*, at 1870–1886. The impact of this charter on the present litigation is discussed *infra*, at n. 93–95.

controversy over this border which led to the royal decree of 1740, a decree that set forth both the northern and the southern boundaries of New Hampshire and remains the authoritative declaration of those lines.

Like Massachusetts' earlier effort to exercise jurisdiction over Maine and New Hampshire following the death of Mason and later of Gorges, the legal issue as to New Hampshire's southern boundary, focused on the language of its grant along the Merrimack River, and no small amount of territory was at stake. This was the primary controversy;[46] however, the matter of the boundary between New Hampshire and the Maine portion of Massachusetts in its more northerly reaches was also considered. In 1731, a committee of representatives from the two provinces met at Newbury in an attempt to resolve the dispute, but they were unable to agree and soon separated.[47] Thereupon, the agents of New Hampshire presented the matter to King George II who, in turn, referred it to the Board of Trade.[48]

[46] Belknap has described the motivations of New Hampshire in this dispute as follows:

"It must be observed, that the party in New-Hampshire, who were now earnestly engaged in the establishment of the boundary lines, had another object in view, to which this was subordinate. Their avowed intention was to finish a long controversy, which had proved a source of inconvenience to the people who resided on the disputed lands, or those who sought an interest in them; but their secret design was to displace Belcher, and obtain a governor who should have no connexion with Massachusetts. To accomplish the principal, it was necessary that the subordinate object should be vigorously pursued. The government of New Hampshire, with a salary of six hundred pounds, and perquisites amounting to two hundred pounds more, equal in the whole to about eight hundred dollars per annum, was thought to be not worthy the attention of any gentleman; but if the lines could be extended on both sides, there would be at once an increase of territory, and a prospect of speculating in landed property; and in future there would be an increase of cultivation, and consequently of ability to support a governor."

Belknap, *supra*, vol. I, at 237.

[47] 2 W. Williamson, The History of the State of Maine (1839), at 194.

As is not unusual in complicated cases, time waited on law, and the dispute remained under consideration by the Board of Trade until 1735 when it was recommended that commissioners from the other New England colonies be appointed to settle the question. Further delay ensued, but finally, on April 9, 1737, a commission was signed by the King appointing 20 members of the provincial councils in New York, New Jersey, Rhode Island, and Nova Scotia to serve as commissioners in the dispute.[49] In August, they convened in Hampton, New Hampshire, to hear evidence and arguments on the question. Much of the debate that then followed is of no particular relevance to the present boundary dispute since it focused on the Merrimack boundary, but there was some controversy over the Piscataqua boundary between New Hampshire and Maine.

3. The 1740 Decree.

In its brief before the commissioners, New Hampshire argued that:

"[T]he northern boundary of New Hampshire

[48] A word of explanation about the system at home through which royal authority over the colonies was exercised is in order:

"The Privy Council was the department upon which the primary responsibility for the administration of the colonies devolved. In 1660 a committee was appointed for the purpose of advising and assisting the Privy Council relative to the administration of the colonies. At the same time another sub-committee was appointed to advise in regard to trade. In 1674 the plan of a dual committee was abandoned, and a board of twenty-four members was appointed for the purposes mentioned above. This was known as the Lords Commissioners for Trade and Plantations. The next important change occurred in 1696, when the Board of Trade was inaugurated. This instrumentality was maintained in the colonial business until the end of the province period."

Introduction, 2 Laws of New Hampshire (1913), at xlvii.

[49] The Commission is reprinted in 2 Laws of New Hampshire (1913), App., at 768–770.

should begin at the entrance of Piscataqua Harbor and so to pass up the same into the River of Newichwannock [now the Salmon Falls] and through the same into the furthest head thereof, and from thence northwestward (that is north less than a quarter of a point westerly) as far as the British Dominion extends and also the western half of the Isles of Shoals . . . ." [50]

Massachusetts, on the other hand, claimed the following:

"And on the northerly side of New Hampshire a boundary line beginning at the entrance of Piscataqua Harbour, passing up the same to the River Nevichwannock through that to the furthest head thereof, and from thence a due northwest line . . . ." [51]

In the debates on this boundary, the focus was clearly on the northern extension of the line, for the division of the land around Piscataqua Harbour and the Isles of Shoals appeared well agreed upon. Indeed, one of New Hampshire's arguments regarding the northern limits depended upon the well-known division of the Isles of Shoals between the provinces.

Massachusetts had argued that the phrase "northwestward" in the 1691 recharter of Massachusetts and Maine [52] meant 45° west of north, but New Hampshire,

[50] Proceedings of the Commissioners for settling of Boundary Lines between the Provinces of the Massachusetts Bay and New Hampshire, dated at Hampton in New England the 19th of October 1737, at 10, attached as Appendix B to this report and referred to hereinafter as Proceedings.

[51] Proceedings, at 21–22.

[52] The grant provides:

"[A]lsoe all that part or pareon of Main Land beginning at the Entrance of Pescattaway Harbour and soe to pass upp the same into the River of Newickewnannock and through the same into the furthest head thereof and from thence *Northwestward* till One Hundred and Twenty Miles be finished . . . ." (Emphasis added.) 3 Thorpe, Federal and State Constitutions (1909), at 1876.

relying on the common understanding of the boundaries of the Isles of Shoals, made the following argument:

"What is offered in the demands of the Massachusetts appears to us so highly unreasonable that we have been lead to say more than otherwise we should. But on this part of the dispute we would only add that if after all your Honours should be inclined to think this line was intended to be a parallel to the river, we cant think that you will with them be of opinion it should be so where the river runs north, because to us it appears an affront to common sense as to the northern boundary of New Hampshire or the line that should be run between that part of the Province of the Massachusetts Bay, which was the late Province of Main and New Hampshire, we think that the Massachusetts can claim no further than the bounds set forth in their Charter and the setting that point ends the dispute, for we say what is not within their Province is within ours, now the words of the Charter must be the guide here as well as on the other side, and so far as the river runs there can be no dispute, and by the word directing the course afterwards viz.: Northwestward, can with propriety be meant nothing but a few degrees west of the north, and is an equivalent expression or the same with northwesterly, which is always understood to mean a few degrees less than a quarter of a point west of the north, and this course it ought to run from the head of the river now called Salmon Falls, which is at a pond. We are confirmed in this opinion, because the half [140] of the Isles of Shoals lies in the Province of the Massachusetts, viz.: The easterly half between which and the other half lyes the harbour or road, which is near south from Piscataqua River. Now if the line from the head of the river should be northwest, this from the mouth of the river should

be southeast, and then all the Isles of Shoals will fall in the Province of New Hampshire contrary to the express words of the Charter." [53]

This argument adduced by New Hampshire is of particular interest to the present dispute for what it tells us about the way in which the parties conceived the geography of the time and their assumption—seemingly confirmed by the result of that case—that the Isles of Shoals were naturally parted by a straight line drawn from the mouth of the Piscataqua Harbour. Though Belknap is critical of New Hampshire's logic in this argument, its usefulness in evaluating the meaning of the ultimate decree cannot be gainsaid.

Belknap comments:

"The agents for Massachusetts, when this claim was put in by New Hampshire, could hardly think it was seriously meant . . . . The only ostensible reason, given for this construction was, that if a northwest line had been intended, then a southeast line, drawn from the mouth of the harbour, would leave all the Isles of Shoals in New Hampshire; whereas the dividing line runs between them. On the other side, it might be said, with equal propriety, that a line drawn south, two degrees east, from the mouth of the harbour, would leave all these islands in Massachusetts. For the point where the islands are devided bears south, twenty-nine degrees east, from the middle of the harbour's mouth; the variation of the needle being six degrees west." [54]

Without knowing more about Belknap's own charts, of course, his plotting of the bearings of the Isles of Shoals is meaningless, but it is obvious that he, like New Hampshire's agents before the royal commissioners, assumed that a straight line projected from the harbour's mouth

[53] Proceedings, at 32–33.

[54] Belknap, *supra*, vol. I, at 249.

to the islands. This is confirmed somewhat by reference to the map of New Hampshire's boundaries drawn by the surveyor George Mitchell at the order of the Commissioners, and attached to this report as Appendix C. By visual inspection, one observes that the only line which could naturally pass to the center of the harbor of the Isle of Shoals would be a straight line drawn from the mouth of the harbor, which appears to be the seawardmost points of land in the two colonies.

Of some interest to the present dispute, also, is the other of the "controvered questions" about the Maine-New Hampshire boundary, *i. e.*, "whether the line should run up the middle of the river or on its northeasterly shore." [55] Though nothing was said of this issue in the proceedings, it appears as a part of New Hampshire's subsequent claim of error.[56] In its final decision dated September 2, 1737, the Commissioners held, in part, as follows.

"And as to the Northern Boundary between the Said Provinces the Court Resolve & Determine that the Dividing Line Shall pass up thro' the mouth of Piscataqua Harbour & up the Middle of the River into ye River of Newichwannock (part of which is now called Salmon Falls) & thro' the Middle of the Same to the furthest head thereof & from thence North two Degrees Westerly until one hundred & twenty Miles be finished from ye Mouth of Piscataqua Harbour aforesai^d^ or until it meets with His Majestys Government^ts^ and that the Dividing line shall part the Isles of Shoals & run thro' the Middle of the Harbour between the Islands to the sea on the Southerly Side & that the Southwesterly part of the Said Islands Shall lye in & be accounted part of the Prov. of New Hamp^r^ & that ye North Easterly part

[55] Williamson, *supra*, at 196–197; Belknap, *supra*, vol. I, at 245.

[56] See text, *infra*, at nn. 83–85.

thereof shall lie in & be Accounted part of the Prov. of the Mass[a] Bay & be held & Enjoyed by the Said Prov[a] Respectively in the Same manner as they Now do & have heretofore held and Enjoyed the Same . . . ." [57]

This was a decision quite to the liking of New Hampshire regarding the northern extension of its boundary with Maine, but not as to the Piscataqua Harbour area. Accordingly, the agents of New Hampshire, at the direction of its legislature, filed exceptions with the Commissioners on October 14, 1737, in part as follows:

"[3d]ly and as to the Northern Boundary: We object against that part of the Judgm[t] that Says: 'Through the Mouth of Piscataqua Harbour and up the Midle of the River' Because we humbly conceive that m[r] Gorges Patent, By which the Mass[a] Claime, doth not convey any Right to the River. For the whole of that River and the Jurisdiction thereof hath Ever been in the Possession of this Province and never Claimed by the Massachusets: and this Province in order to preserve & Safeg'ard the same have always had a Castle and maintaind a Garrison there . . . ." [58]

This issue was again raised by New Hampshire in its petition of appeal to the King, by way of complaining about the conduct of the royal governor, Jonathan Belcher, who held commissions as governor of both New Hampshire and Massachusetts. The petition stated in relevant part:

"And by such votes or Exceptions the New Hamp[r] Assembly humbly Insisted that . . . the Assembly Objected . . . against the Com[rs] adjudging to the Massachusetts Bay the half of Piscataqua River

[57] 2 Laws of New Hampshire (1913), App. at 771.

[58] 2 Laws of New Hampshire (1913), App., at 772; Proceedings, at 204.

when the same was not Included in their grant nor had been ever pretended to or demanded by them their grant Extending to Land Only and not to the River and in generall Insisted that the Bounds should be According to the Demands filed by New Hamp[r]

"Which Objections or Exceptions the Com[rs] Rec[d] tho the Agent for the Massachusetts Bay very Demurely opposed the same as not coming from the whole Legislature when their own Gov[r] had so Contrived as to make that absolutely Impossible . . . ." [59]

Massachusetts, meanwhile, was not silent in criticizing the Commisioners' decision, and filed its own exception and appeal, principally attacking the delimitation of the northern extension of the boundary between New Hampshire and Maine,[60] as well as the Merrimack River

[59] 2 Laws of New Hampshire (1913), App., at 779.

[60] In this regard, Massachusetts argued:

"The Province of the Massachusetts also declare themselves aggrieved at the Determination of the Said Hon[ble] Commissioners touching at the Northermost Line Viz[t] Where it adjudges.

"1[st] That that Line Shall proceed from the furthest Head of Newichawannock River North two Degrees Westerly; Whereas it Should have been that it Should proceed thence Northwestward, which is a well known & certain Course, the Same, as towards the Northwest, and makes a Right Angle with the Line directed by this Province Charter to run from Piscataqua Harbour's Mouth Northeastward along the Sea Coast to Sagadahock, which lyes towards the Northeast; For we cannot Suppose that when their Royal Majesty's King Charles the first, King William & Queen Mary used these Terms Northwestward & Northeastward to express the Course of those two Lines with certainty, and to the understanding of mankind, their Intent & Meanig could be, that the Line runing up the River One Hundred & twenty Miles Should be North two Degrees East; For this would make the Province of Main instead of a Tract of Land of One Hundred & twenty Miles Square, only a Gore, being at one End a Point, & but eight Miles wide at the other, not one Twentieth part of their Grant."

2 Laws of New Hampshire (1913), App., at 782.

boundary, which had gone against it. On July 26, 1738, the appeal was referred by the King to the Lords of the Committee of the Privy Council for Hearing Appeals from the Plantations, and, after more than a year of deliberation, the committee recommended acceptance of the Commisioners' decision on the Maine-New Hampshire boundary without change.[61] On April 9, 1740, King George II signed a decree accepting the Committee's recommendation and thus permanently fixed the Maine-New Hampshire boundary.[62]

[61] The boundary between New Hampshire and Massachusetts along the Merrimack was modified, see 2 Laws of New Hampshire (1913), App., at 793–794, but due to an apparent surveyor's error the line was never finally located until an interstate agreement in 1895. *Id.*, at 790.

[62] Williamson suggests political motivation in the King's approval of the report, commenting:

"At the instance of the Massachusetts' agents, the opinion of the learned Dr. Halley was obtained; who very correctly certified, that 'a line north-westward,' ought to run 45 degrees westward of the north point. This was a mathematical truth; and it might have been applied with good effect, had not the New Hampshire agents, with some success, touched the strings of ministerial clemency, by representing their poor, little, loyal, distressed Province, as in great danger of being devoured by the opulent and overgrown Province of Massachusetts. Whereas, said they, if the borders of New-Hampshire were enlarged,—alluding to her southern more than to her eastern limits,—her abilities might enable her to support a Governor, separate from any other Province." Williamson, *supra*, vol. 2, at 168–169.

To say this, however, is not to say anything startling, for political and economic interests are inextricably bound up with border disputes. Of greater relevance to an enlightened view of these events are the remarks of Belknap regarding the so-called "Wheelwright grant," a possibly spurious document purporting to be a deed of land from various Indian Chiefs to one John Wheelwright ("late of England, minister of the gospel") dated May of 1629, granting the following territory:

"[All] that part of the main land bounded by the river of Piscataqua, and the River of Merrimack . . . and the main channel of each river from Pantuckett and Neckewannock Falls to the main sea to be the side bounds, and the main sea between Piscaqua River and Merrimack River to be the lower bound, together with all islands within said bounds, as also the Isles of Shoals so called by the English . . . ." Proceedings, at 137.

For a brief discussion of the validity of this document, see 4 Thorpe, Federal and State Constitutions (1909), at 2520–2521. Although this grant has never been deemed to be of any significance in title or boundary considerations, the following passage from Belknap about the Wheelwright patent is thought provoking, especially in light of this Nation's increased sensitivity to native Americans:

"By this deed, the English inhabitants with these links obtained a right to the soil from the original proprietors, more valuable in a moral view, than the grants of any European prince could convey. If we smile at the arrogance of a Roman Pontiff in assuming to divide the whole new world between the Spaniards and Portuguese, with what consistency can we admit the right of a king of England, to parcel out America to his subjects, when he had neither purchased nor conquered it, nor could pretend any other title, than that some of his subjects were the first Europeans who discovered it, whilst it was in possession of its native lords? The only validity which such grants could have in the eye of reason was, that the grantees had from their prince a permission to negotiate with the possessors for the purchase of the soil, and thereupon a power of jurisdiction subordinate to his crown." Belknap, *supra*, vol. I, at 8.

This boundary decreed by the King during the provincial period remained the same when Massachusetts and New Hampshire helped to form the Union and, later, when Maine was formally separated from Massachusetts in 1819 [63] and admitted to the Union.[64] Unlike the congressional enabling acts for other States subsequently admitted to the Union, neither the acts of ratification of the Articles of Confederation or the Constitution passed by Massachusetts and New Hampshire, nor the congressional act admitting Maine in 1820 specifically defined the boundaries of these States, and the States entered the Union with boundaries fixed as of

[63] Act of June 19, 1819, c. CLXI, Laws of the Commonwealth of Massachusetts.

[64] Act of April 7, 1820, c. XIX, 3 Stat. 544.

that date.[65] For all intents and purposes, the decree of 1740 fixed the boundary in the Piscataqua Harbor area, and nothing has been done by the legislatures of those States to alter these territorial limits. The question in this case therefore is the proper interpretation of that decree's language and its effect upon the disputed boundary.

4. Application of the 1740 Decree.

As stated above, the 1740 decree provided, in part,:

> "That the Dividing Line shall pass up through the Mouth of Piscataqua Harbour and up the Middle of the River . . . And That the Dividing Line shall part the Isles of Shoals and run through the Middle of the Harbour between the Islands to the Sea on the Southerly Side . . . ."

To interpret this language and apply it to the geography of the area, it is necessary to break the decree down into the essential elements: (1) What is meant by "the Mouth of Piscataqua Harbour"; (2) What is meant by "the Middle of the River"; (3) Where does the line parting the Isles of Shoals begin to "run through the Middle of the Harbour"; and (4) How shall "the Dividing Line" proceed between the mouth of the Piscataqua and the Isles of Shoals? These will be taken up seriatim.

(a) *The Mouth of the Piscataqua.*

In its original complaint and pretrial submissions, the State of New Hampshire took the position that the mouth of Piscataqua Harbour (now Portsmouth Harbor)

[65] Cf. *New Jersey* v. *Delaware*, 291 U. S. 361, 370–371 (1934). It has been said that: "In general, the original states maintained their claims to their colonial boundaries." Griffin, "Delimitation of Ocean Space Boundaries between Adjacent Coastal States of the United States," in Proceedings of the Third Annual Conference of the Law of the Sea Institute, June 24–27, 1968, University of Rhode Island (1969), at 143. Accord F. Van Zandt, Boundaries of the United States and the Several States (U. S. Geological Survey Bulletin 1212, 1966), at 2.

lay between Jaffrey Point on New Castle Island and Pochahontas Point on Gerrish Island (formerly Champernoun's Island). *Amici curiae* suggest in their submission that the mouth of the harbor was historically considered to be at Fort Point on New Castle Island, or, alternatively that "the present day closing line of the harbor [is] the Frost Point—Wood Island—Gerrish Island line,"[66] which corresponds roughly to that claimed by New Hampshire. Maine in its pretrial submissions, on the other hand, asserts that the mouth of the harbor is "at a line extending from the headland at Odiorne's Point, Rye, New Hampshire, to the headland south of Seaward's Cove, on Gerrish Island." Though such a phrase as "mouth" is difficult to define,[67] it is the conclusion of the Special Master that the term "Mouth of Piscataqua Harbour" in the 1740 decree could only mean

[66] Brief of *Amici Curiae* in Reply to Plaintiff's Brief in Support of Proposed Consent Decree (filed February 26, 1975), at 4.

[67] The King in Council would have done well to have heeded the following advice from one "expert":

> "It is likewise fallacious, and dangerous in boundary-making, to assume that a river has a mouth which is a precise point. Some rivers have no mouths, sinking in desert sands or losing themselves in swamps. Others have several mouths entering the sea through deltas. Many important navigable rivers are of this type. Even those rivers with a single embouchure give trouble to the boundary-maker. The mouth is an area, not a point. Also, it may be questioned whether the mouth-area lies at the head of the estuary or bay or at the entrance into the estuary or bay from the seas. In short, the same recommendations apply to mouths as to sources: if possible, a precise point should be defined; failing that, 'a convenient point near the mouth' may be stipulated.
>
> "The mouth of a navigable river is often its most important part, yet there may be less natural indication of where the boundary should like than along the course of some remote non-navigable tributary. If the river ends in a delta, there may be several mouths, perhaps no principal mouth, and new mouths may be opened and old ones abandoned."

S. Jones, Boundary-Making: A Handbook (1945), at 130 (footnotes omitted).

the opening between the seawardmost points of land at which the shore "turns" as the Piscataqua River flows into the ocean, *i. e.*, at a line extending from Odiorne's Point (at approximately 43°2′32.1″ North and 70°42′-38.4″ West) to a point southwest of Seward's Cove on Gerrish Island (at approximately 43°3′52.0″ North and 70°41′15.5″ West). [All "Calls" refer to the stipulated Chart 211.]

Maps contemporary to the King's decree and historical texts support this conclusion. For example, Mitchell's map, alluded to earlier as being drawn for the boundary commissioners,[68] has the phrase "The Mouth of Piscataqua Harb'r" written through the opening between Odiorne's Point and Gerrish Island, beginning well out in the ocean, and depicts New Castle Island (or Great Island) as simply "floating" slightly north of the harbor. *Amici curiae* rely on certain references in historical texts for their claim that Fort Point on New Castle Island lies at the entrance of the harbor, but it is clear from the context of these statements that they are meant in a strategic or nautical sense and not in the geographic sense. One reference, for example, is to "the fort which commandeth the mouth of the harbor"; [69] another, which gives sailing instructions for navigating along the New England coast, refers to the Portsmouth lighthouse on "Fort Point (New Castle Island) at the entrance of the harbour." [70] More to the point, however, is Belknap's remark in his

[68] G. Mitchell, "A Plan of the Rivers and Boundary Lines referred to in the Proceedings and Judgment [of the Commissioners for Settling the Boundary Lines between the Provinces of the Massachusetts Bay and New Hampshire]" (1737). Attached as Appendix C.

[69] Letter from Edmund Randolph to the Lords of Trade and Plantations, in Belknap, *supra*, vol. I, App., at 463. See Addendum to Accompany Brief of *Amici Curiae* (filed Feb. 21, 1975), at Enclosure 3.

[70] Blunt, American Coast Pilot (1822), at 146. See Addendum to Accompany Brief of *Amici Curiae* (filed Feb. 21, 1975), at Enclosure 5.

"Description of the harbour and river of Pascataqua" that:

> "In the middle of the harbour's mouth, lies Great Island, on which the town of Newcastle is built." [71]

Belknap goes on to make a sensible distinction between the "main entrance" into the actual harbor area (between the north side of Great Island and Kittery Shore) and the "other entrance" on the south side of Great Island called Little Harbor,[72] but it is a distinction which hardly detracts from the obviousness of the harbor's mouth as extending from Odiorne's Point to Gerrish Island. Moreover, as was pointed out, *supra*, the earliest New Hampshire settlement was founded by David Thompson at the mouth of the Piscataqua on Odiorne's Point.[73] That the Commissions and the King likely intended the phrase "mouth of Piscataqua Harbor" to mean a line essentially like the one now recommended by the Special Master is additionally confirmed by a study of several early maps. One detailed map, which is dedicated to Charles II's brother, James, Duke of York, and hence dated in the late 17th century, unequivocally portrays the opening between Odiorne's Point and "Champernones Island" (Gerrish Island) as the harbor mouth.[74] Other maps of that period are in accord.[75]

[71] Belknap, *supra*, vol. II, at 145.

[72] *Id.*, at 145–146.

[73] See text, *supra*, at n. 22.

[74] I [?] 8 [?]—"Pascataway River in New England" in The Crown Collection of Photographs of American Maps (Hulbert, ed., 1904), Vol. I, No. 23. Attached as Appendix D.

[75] See, *e. g.*, the following maps: Hack [?], "The Province of Mayne" (1680); Morden, "New England" in R. Blome, The Present state of His Majesties isles and Territories in America (London 1687), at 210; map in C. Mathew, Magnolia Christi's Americana (London 1702); Jeffry "A Draft of that Part of the Province of New Hampshire, etc.," (1720); Colonel Dunbar, "New Hampshire" (1730); Morris, "Draft of the Northern English Colonies" (1749); Belknap, "A New Map of New Hampshire" (1791). All of these

New Hampshire has drawn attention to nautical publications which describe the mouth of Portsmouth Harbor as "a cross section between Odiornes Point and the rocky reefs and islands south of Gerrish Island" or as "a line joining Odiores Point and Kitts Rock whistle buoy."[76] Since the question is the meaning of the 1740 decree, it cannot be said that uncharted "rocky reefs" or later navigational aids could have played any part in the deliberations of the King and Commissioners, but rather a location on more solid land was intended.

(b) *The Middle of the River.*

Next is the question of what is meant by the term "middle of the river" in the 1740 decree. This could mean either the geographic middle of the river or the middle of the main channel, *i. e.*, the so-called "thalweg." The Supreme Court recently discussed such an issue in the context of a boundary dispute between Texas and Louisiana, stating:

> "The argument that the middle of the main channel was intended rests on the line of cases in this Court beginning with *Iowa* v. *Illinois*, 147 U. S. 1 (1893), which holds that in normal circumstances it should be assumed Congress intends the word 'middle' to mean 'middle of the main channel' in order that each State would have equal access to the main navigable channel. The doctrine was borrowed from international law and has often been adhered to in this Court, although it is plain that within the United States two States bordering on a navigable river would have equal access to it for the purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg."

maps may be found in the Permanent Collection of the Geography and Map Division, Library of Congress.

[76] A Hoskinson & E. LeLacheur, Tides and Currents in Portsmouth Harbor (U. S. C. & G. S., 1929), at 2, 29.

> *Id.*, at 7, 8, 10. *New Jersey* v. *Delaware*, 291 U. S. 361, 380–385 (1934).
>
> "In *Iowa* v. *Illinois*, however, the Court recognized that the issue was the intent of Congress. [In the enabling acts which admitted Texas and Louisiana into the union] 147 U. S., at 11 and that it was merely announcing a rule of construction with respect to statutes and other boundary instruments. Thus, it was acknowledged that the rule might be changed by 'statute or usage of so great a length of time as to have acquired the force of law.' *Id.*, at 10. When Congress sufficiently indicates that it intends a different boundary in a navigable river, the Thalweg rule will not apply."

Texas v. *Louisiana*, 410 U. S. 702, 709–710 (1973) (footnotes omitted). In addition, the Court remarked in a footnote as follows:

> "That the 'middle' of a river was to be construed as the thalweg in establishing the boundary between the States newly admitted to the Union was not authoritative doctrine prior to 1892 when *Iowa* v. *Illinois*, 147 U. S. 1, was decided and certainly not when Louisiana was admitted to the Union in 1812. The opinion in *Iowa* v. *Illinois*, *supra*, referred to five treatises on international law in support of its holding . . . ." *Id.*, at 709 n. 6.

Although perhaps not "authoritative doctrine" in the United States Congress, one commentator asserts that the thalweg principle was "a doctrine laid down in Roman Law and in vogue among the Anglo-Saxons as early at least as the seventh century."[77] Mr. Justice Cardozo in *New Jersey* v. *Delaware*, 291 U. S. 361 (1934), traced the history of the doctrine at length:

> "Anciently, we are informed, there was a principle

[77] Fulton, The Sovereignty of the Sea (1911), quoted in G. Knight, The Law of the Sea: Cases, Documents, and Readings (1975), at 57.

of co-dominion by which boundary streams to their entire width were held in common ownership by the proprietors on either side. 1 Hyde, International Law, p. 243, § 137. Then, with Grotius and Vattel, came the notion of equality of division (Nys, Droit International, vol. 1, pp. 425, 426, Hyde, *supra*, p. 244, citing Grotius, De Jure Belli et Pacis, and Vattel, Law of Nations), though how this was to be attained was still indefinite and uncertain, as the citations from Grotius and Vattel show. Finally, about the end of the eighteenth century, the formula acquired precision, the middle of the 'stream' becoming the middle of the 'channel.' There are statements by the commentators that the term Thalweg is to be traced to the Congress of Rastadt in 1797 (Englehardt, Du Regime Conventionnel des Fleuves Internationaux, p. 72; Koch, Histoire des Traites de Paix, vol. 5, p. 156), and the Treaty of Luneville in 1801. Hyde, *supra*, pp. 245, 246; Kaeckenbeck, International Rivers, p. 176; Adami, National Frontiers, translated by Behrens, p. 17. If the term was then new, the notion of equality was not. There are treaties before the Peace of Luneville in which the boundary is described as the middle of the channel, though, it seems, without thought that in this there was an innovation, or that the meaning would have been different if the boundary had been declared to follow the middle of the stream. Hyde, *supra*, p. 246. Thus, in the Treaty of October 27, 1795, between the United States and Spain (Ar icle IV), it is 'agreed that the western boundary of the United States which separates them from the Spanish colony of Louisiana is in the middle of the channel or bed of the River Mississippi.' Miller, Treaties and other International Acts of the United States of America, vol. 2, p. 321. There are other treaties of the same period in which the boundary is described as the middle of the river without further definition; yet this court has held that the phrase was intended to be equivalent to the middle of the channel. *Iowa* v. *Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 S. Ct. 239, *supra*; *Arkansas* v. *Tennessee*, 246 U. S. 158, 62 L. ed. 638, 38 S. Ct. 301, L. R. A. 1918D, 258 and *Arkansas* v. *Mississippi*, 250 U. S. 39, 63 L. ed. 832, 39 S. Ct. 422, *supra*. See, *e. g.*, the Treaty of 1763 between Great Britain, France and Spain, which calls for 'a line drawn along the middle of the River Mississippi.' The truth plainly is that a rule was in the making which was to give fixity and precision to what had been indefinite and fluid. There was still a margin of uncertainty within which conflicting methods of uncertainty within which conflicting methods of division were contending for the mastery." 291 U. S., at 381–383.[78]

[78] Footnotes 5 and 6 accompanying the Court's opinion are as follows:

"Grotius has this to say (De Jure Belli et Pacis, Book 2, chap. 3 § 18): 'In Case of any Doubt, the Jurisdictions on each Side reach to the Middle of the River that runs betwixt them, yet it may be, and in some Places it has actually happened, that the River wholly belongs to one Party; either because the other Nation had not got possession of the other Bank, 'till later, and when their Neighbours were already in Possession of the whole River, or else because Matters were stipulated by some Treaty.'

"In an earlier section (§ 16, subd. 2) he quotes a statement of Tacitus that at a certain point 'the Rhine began . . . to have a fixed Channel, which was proper to serve for a Boundary.'

"Vattel (Law of Nations, *supra*) states the rule as follows: 'If, of two nations inhabiting the opposite banks of the river, neither party can prove that they themselves, or those whose rights they inherit, were the first settlers in those tracts, it is to be supposed that both nations came there at the same time, since neither of them can give any reason for claiming the preference; and in this case the dominion of each will extend to the middle of the river.'

"See also the treaties collected in the Argument of the United

Mr. Justice Cardozo concluded therefore that, at the time of the American Revolution, "the formula of the Thalweg had only a germinal existence," [79] but applied it nevertheless on the grounds of "equality and justice," 291 U. S., at 380, since the doctrine had enough of a "twilight existence" in the late 18th century to justify application in a case where there was *no* written boundary decree.

Turning to the case at hand, there is little in the "legislative history" of the 1740 decree to establish what was meant by the "middle of the river." The references to "channel" in the record of the proceedings of the Commissioners do not support any inference that the Commissioners "had well in mind the 'main channel' concept," [80] as suggested by Maine and New Hampshire. The word "channel" does not appear in the record, but only in relation to: (a) the Merrimack River boundary which was defined by the Original grant in terms of "where it runs into the Atlantic Ocean; [81] and (b) a purported deed of New Hampshire land from certain Indians to one John Wheelwright.[82] Neither use of the word "channel" can be thought apposite to the Thalweg doctrine issue. The only relevant part of the record is New Hampshire's comment in its Petition of Appeal to the King following the decision of the boundary commissioners in which the province objected to "the Commissioners adjudging to the Massachusetts Bay *the half of* Piscataqua River when the same was not included in their

States before the International Boundary Commission in the Chamizal Arbitration of 1910 between the United States and Mexico.

"Nys traces the concept of the Thalweg to a period earlier than the Treaty of Munster, 1648. Droit International, v. 1, p. 426."

[79] 291 U. S., at 383.

[80] New Hampshire's Brief in Support of Proposed Consent Decree and in Reply to *Amici Curiae* (filed Feb. 18, 1975), at 7.

[81] Proceedings, at 26. Maine relied on this passage in its discussion of the matter in its Pretrial Memorandum (filed April 19, 1974), at 3 n. 2.

grant . . . ." [83] The Supreme Court, it should be noted, found the use of the term "one half" by Congress in the 1848 enabling act for Texas to be determinative in *Texas* v. *Louisiana, supra,* 410 U. S., at 1218; 410 U. S., at 1223 (DOUGLAS, J., dissenting).

Of some interest, too, is the common law rule regarding both public and private boundaries along rivers: the owner of each side of a nonnavigable river was presumed to have control of *ad medium filum aquae, i. e.,* to the geographic middle of the river, but the soil at the bottom of a navigable river was presumed to be in the Crown. See *Lord* v. *Commissioners for the City of Sydney,* 12 Moo. P. C. 473, 497–498 (1859); W. Jowitt, ed., The Dictionary of English Law (1959), at 52.

It is the conclusion of the Special Master that the Thalweg doctrine is unavailable as an interpretive tool in this case for the following reasons: (1) as noted by Mr. Justice Cardozo in *New Jersey* v. *Delaware,* the Thalweg doctrine was only in "germinal existence" in the mid-18th century; (2) the Maine-New Hampshire line derives from a written boundary decree, which must be interpreted and not from the pure application of international law principles as in *New Jersey* v. *Delaware;* and (3) the "legislative history" surrounding the 1740 decree, though sparse, suggests that at least one of the colonies, New Hampshire, imagined that "one half" of the river had been allocated to each of the colonies. Together these factors inevitably lead to the conclusion that the geographic middle of the river and not its main or navigable channel was intended by the 1740 decree.

The next question, of course, is how to define the exact course of such a line within the Piscataqua River,

[82] Proceedings, at 137. New Hampshire emphasized this text in its Brief in Support of the Consent Decree and in Reply to *Amici Curiae* (filed Feb. 18, 1975), at 7.

[83] 2 Laws of New Hampshire (1913), App. at 779 (emphasis added).

for the point at which that line crosses the closing line of the harbor is obviously crucial to the resolution of this case. The theoretical answer is that the middle or median line is a continuous line following the meandering of the river and everywhere equidistant from the nearest points on opposite sides using the actual water edges at the mean low water line.[84] For the purposes of

[84] See S. Boggs, International Boundaries: A Study of Boundary Functions and Problems (1940), at 179–184, for an explanation of the principles used in drawing such a line equidistant from the nearest points of either State along the river, including low-tide elevations.

The use of the low water line and low-tide elevations in the Piscataequa River is recommended by several factors. First, the decree of 1740 itself seems to indicate a preference for using the low water line. In describing the southern boundary of New Hampshire, the decree uses the words: "three English Miles North from the Southerly side of the Black Rocks aforesaid at Low Water Mark . . ." Second, Article 11 of the Convention on the Territorial Sea and the Contiguous Zone, entered into force September 10, 1964, 15 U. S. T. (pt. 2) 1607, 1609, T. I. A. S. No. 5639, urges the use of the low water line and low-tide elevations to establish the baseline for measuring the breadth of the territorial sea. Although in this case we are concerned with the inland waters of a river, at least one prominent authority suggests that the baselines be drawn in the same manner. See A. Shalowitz, Shore and Sea Boundaries (1962), at 374 n. 30. Third, the Court has indicated that for purposes of drawing baselines under the Convention's rationale there is "no distinction" between low-tide elevations and islands. *United States* v. *Louisiana*, 394 U. S. 11, 60 n. 80 (1969). The Court recently reaffirmed that determination by accepting the Report of the Special Master, Walter P. Armstrong, Jr., in *United States* v. *Louisiana*, 420 U. S. 529 (1975). See the Report, *supra*, at 35. Finally, even countries not signatories to the Convention, *supra*, have recognized and used low-tide elevations in fixing equidistant lines for boundaries. See, *e. g.*, U. S. Department of State, Bureau of Intelligence and Research, Office of the Geographer, Limits in the Seas, No. 60, Territorial Sea Boundary: Indonesia-Singapore (November 11, 1974); No. 18, Continental Shelf Boundary: Abu Dhabi-Qater (May 29, 1970); and No. 12, Continental Shelf Boundary: Bahrain-Saudi Arabia (March 10, 1970).

The significant points in the Piscataqua Harbor are those low-tide elevations and low water lines on either side of the harbor

the present dispute, however, it is unnecessary to lay out fully the course of the boundary as it proceeds upriver; all that is necessary is the determination of the point at which it crosses the line of the harbor's mouth.[85] Therefore, in this case, it is at approximately 43°3'1.7" North and 70°42'8.0" West.

(c) *The Middle of Gosport Harbor, Isles of Shoals.*

The third step in the interpretation of the Royal Decree is the determination of the "Middle of the Harbour" of the Isles of Shoals. It has been concluded that the Thalweg doctrine is inapplicable to the Piscataqua River line, and the same is true of Gosport Harbor in the Isles of Shoals. It is unavailing to discuss the location or length of any "channel" in this area, since the geographic middle of the harbor must be considered to have been intended by the King and Commissioners. Again as in the Piscataqua River, it is only necessary to identify the point at which the dividing line of the harbor crosses the closing line of the harbor.[86]

In this task, there is unfortunately little in the way of textual or map aids like those that assisted our examination of the Piscataqua Harbor; nevertheless the

that are nearest each other: the low water line at Odiornes Point and rocks that expose at low tide off of Jaffrey Point and in Whaleback Reef.

[85] It would be wise to remind ourselves of the following consolatory words of the Supreme Court in *Texas* v. *Louisiana*, 410 U. S., at 710: "[I]t is plain that within the United States two States bordering on a navigable river would have equal access to it for the purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg."

[86] Thus, it is not necessary to reach the question of whether this conclusion affects the decision of the Supreme Judicial Court of Maine, 100 years ago in *State* v. *Wagner*, 61 Me. 178, 191 (1873), where it was stated:

"[T]here is no room left for doubt that the line follows the ship channel between Star and Cedar Islands, 'through the middle of the harbor between the islands to the sea on the southerly side . . . .'"

Mitchell map (App. C), is somewhat instructive on this question as well. The seven islands comprising the Isles of Shoals were conceived as forming a natural "V"-shaped harbor where, as Belknap points out, ships might take shelter in bad weather "but it is not then safe for those of large bulk." [87] In this light, there can be little doubt that the "harbor" intended by the 1740 decree began at the headlands on the western side of the two islands forming the tips of the "V", *i. e.*, Lunging Island in New Hampshire and Appledore Island in Maine. These points lie at approximately 42°58′40.5″ North and 70°37′38.7″ West on Lunging Island and at approximately 42°59′6.1″ North and 70°37′10.6″ West on Appledore Island. The geographic midpoint of a line between those two points, by force of logic, would represent the center of the harbor at its seawardmost extent, and lies at approximately 42°58′53.1″ North and 70°37′24.6″ West.

(d) *The Line Connecting Piscataqua and Gosport Harbors.*

Having established the two points of significance in the mouth of Piscataqua Harbor and in the middle of Gosport Harbor, it remains to determine what sort of line is to connect them, based upon the 1740 decree. New Hampshire in its original complaint and pretrial submissions asserted that the boundary is a straight line connecting the above-mentioned points; Maine took a different approach in its Answer and pretrial submissions, arguing as follows:

> "The King was concerned solely with drawing a line of separation between two disputing provinces. The King wished to pass the line through the middle of the mouths of these two harbors. His concern, therefore, was not with straightness, but with providing equality of access.
>
> . . . . . .
>
> "It is obvious that the King decreed that the line should follow the middle of the channel down Piscataqua River to its mouth. It is equally obvious that he decreed that the line should pass through the middle of the channel of Gosport Harbor until it reaches the mouth of that harbor. Although he did not decree explicitly how to connect these two lines, it appears that he was most concerned with the pursuit of two distinct courses; therefore, it would seem reasonable to conclude that the King intended that each of these two channel courses should be followed, as a *direct continuation* of those courses, until these two courses intersect. We contend that this is the correct construction of the King's Order." [88]

Alternatively, Maine argued that these two intersecting lines could be "faired" or merged into a single curving line, connecting the midpoints of the harbors' mouths. It is the conclusion of the Special Master that the King and Commissioners did intend to project a line to pass through open waters between the Isles of Shoals and the mainland and passing through the two points ascertained in Part 4 (b) and 4 (c) of this report, to form the boundary separating the Isles of Shoals.[89]

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[87] Belknap, *supra*, vol. II, at 147.

[88] Pretrial Memorandum of Maine (filed April 19, 1974), at 6–8 (footnotes omitted).

[89] But the line could not be treated as an actual boundary in the intervening sea because the Crown could not grant title to the sea. See *The Queen* v. *Keyn*, [1876–1877] L. R. 2 Exch. Div. 63, and text, *infra*, at nn. 98–100. Additionally, the Court has refused to recognize the existence of any historical basis for believing that the colonies owned the marginal sea along their coasts or the natural resources of the seabed beneath those waters, *United States* v. *Maine*, 420 U. S. 515 (1975); *United States* v. *California*, 332 U. S. 19 (1947).

Initially, it is essential to confront the contentions of both parties that the 1740 decree divided the now disputed waters.[90] Certainly the 1691 Chater of Massachusetts Bay and Maine was broad enough to have intended dominion over any internal waters, for, after setting forth the boundaries along the Piscataqua River and granting the north half of the Isles of Shoals, the charter grants:

> "[A]ll lands, grounds, places, soils, woods and wood grounds, havens, *ports, rivers, waters* and other hereditaments and premisses whatsoever lying within the said bounds and limits aforesaid and every part and parcel thereof, and also all Islands and islets lying within ten leagues directly opposite to the main land within the said bounds . . . ." [91]

Thus there is no doubt that dominion over the internal waters of both Portsmouth and Gosport Harbors was granted to the two provinces. But it is questionable whether dominion over the waters of the coastal sea was ever granted.

To be sure, there had been a battle over free fishing between Gorges and Parliament in the early 1620s,[92] and though both the 1635 grant of New Hampshire to Mason from the Council at Plymouth [93] and the royal charter of Maine to Gorges in 1639 included control over fishing

[90] *Amici curiae* disagreed with these contentions and correctly argue that the 1740 decree could not have divided the waters between Piscataqua and Gosport Harbors in such manner as could fix property interests in those waters. *Amici*, however, incorrectly argue that the current boundary should be drawn on the basis of usage alone and inaccurately imply that the 1740 decree is irrelevant to resolution of this dispute. Brief of *Amici Curiae* (filed Jan. 17, 1975), at 27–28.

(1909), at 1876–1877.

[91] Proceedings, at 94; 3 Thorpe, Federal and State Constitutions

[92] See text, *supra*, at nn. 16–17.

[93] 4 Thorpe, Federal and State Constitutions (1909), at 2444.

in the sea,[94] the 1691 charter specifically provided that all English subjects "shall have full and free power and Libertie to continue and use their said Trade of Fishing upon the said Coasts in any of the seas thereunto adjoining . . . where they have been wont to fish . . . ." [95] This does not appear, however, to have been interpreted as restricting the colonies' rights to regulate fishing within their boundaries or along their coasts, for New Hampshire enacted laws for regulating that trade prior to the royal decree,[96] and, following the Revolution, Massachusetts exercised regulatory power over coastal fishing in Maine, forbidding the taking of mackerel, for example.[97]

But whatever jurisdiction was exercised by regulatory control of the coastal fishing, it could not have been based upon actual ownership of those waters. The better view is that such jurisdiction was naturally derived from the limited protective jurisdiction that the Crown exercised in the area of its coastlines. For despite earlier Stuart claims to the contrary, the Crown no longer claimed to own the coastal seas of its dominion, not even the seas adjacent to the shores of England itself.[98] Thus, the Crown did not make grants of the coastal seas in the New World to the council at Plymouth, or to the council's

[94] 3 Thorpe, Federal and State Constitutions (1909), at 1626.

[95] *Id.*, at 1885.

[96] See Act of May 14, 1718, c. 32, 2 Laws of New Hampshire; see also Act of June 1, 1687, c. 12, Laws of New Hampshire (during the "Dominion of New England").

[97] Williamson, *supra*, vol. 2, at 596–597. For a discussion of the negligible effect of these activities by the colonies upon any claimed property right in or dominion over the adjacent coastal seas, see Report of the Special Master, Albert B. Maris, in *United States* v. *Maine*, No. 35 Original (August 27, 1974) (hereinafter cited as Maris), at 5&-50. The Court has given its approval to the Special Master's Report and his interpretation of the history of offshore boundaries and territorial seas along the Atalntic coast. See *United States* v. *Maine*, 420 U. S. 515 (1975).

[98] See Maris, *supra*, at 40–47.

successors—the colonies of Maine and New Hampshire. This fact is also evident from the words of the charters themselves. The charters specify boundaries that proceed from "sea to sea," or "along the sea coasts," [99] or describe grants of mainland and islands without mentioning adjacent or intervening seas.[100] Logically then, neither the Commissioners in their recommendations nor the King in his subsequent decree proposed to determine a boundary in the sea between Maine and New Hampshire that would apportion to each of the colonies property interest in the coastal or marginal sea. Cf. *United States* v. *Maine*, 420 U. S. 515 (1975); *United States* v. *California*, 332 U. S. 19 (1947).

Although the King did not delimit a Maine-New Hampshire boundary in the sea, the 1740 decree is not meaningless and irrelevant to the resolution of the question of what line shall connect the boundaries that were defined in the Mouth of the Piscataqua Harbor and Gosport Harbor. Rather the use of the phrase, "the Dividing Line," in the decree ineluctably leads to the conclusion that the same single line was intended to demarcate the territory of the provinces on the mainland and to project seaward to divide the Isles of Shoals as well. The decree specifies that "the Dividing Line shall pass up through" Piscataqua Harbor and "the Dividing Line shall part the Isles of Shoals" as well. It says "*the* Dividing Line" in both contexts, not "the first" and "the second" lines, nor even "a" line in one harbor and "a" second one in the other. Further it seems quite unlikely that anything other than a straight line could

[99] See, *e. g.*, text, *supra*, at nn. 15 and 33.

[100] See Maris, *supra*, at 47–48. Faced with similar circumstances requiring a review of English law, the Special Master found persuasive the formulation that "while the coastal state might exercise protective jurisdiction over the intervening seas, it had no right of sovereignty over those seas, its property right involving only the islands, not the seas." *Id.*, at 50–51 (footnote omitted).

have been meant. As pointed out in Part 3,[101] New Hampshire argued in 1737 that a straight line drawn from Piscataqua Harbor would part the Isles of Shoals and the Commissioners appear to have accepted this view. The maps of that period hardly displayed mathematical accuracy, and it is reasonable to suppose that the Commissioners selected the simplest way of connecting the two points in the harbors that they had in mind. The proper line is therefore a straight line bearing approximately 140° clockwise from True North, between the midpoint of the closing line of Gosport Harbor and the point where the "Middle of the River" crosses the closing line of the "Mouth of the Piscataqua Harbor." This is the line that was projected in the 1740 decree. Although it did not determine an appropriate boundary in the sea in 1740, other considerations contribute to its authority as the appropriate boundary for resolution of this dispute.

5. Lateral Offshore Boundary Between the States.

Having established the application of the 1740 decree to the boundary between Maine and New Hampshire in the mouth of the Piscataqua River and the middle of Gosport Harbor, it remains to determine exactly what line is to connect those two points and serve as the lateral offshore boundary between the two States in the disputed lobster waters. As has been shown, the 1740 decree could not have divided the waters in a manner that would fix the property interests in the sea and sea bed between the mainland and the Isles of Shoals. It was not until the Submerged Lands Act of May 22, 1953, 67 Stat. 29, that title to those waters and offshore resources passed to the States.[102] By that Act, Congress confirmed to and vested in the coastal States the seabed and the resources of the territorial sea within three geo-

[101] See text, *supra*, at nn. 52–54.

[102] See *United States* v. *Maine*, 420 U. S. 515 (1975), and see also Maris, *supra*, at 79–80.

graphical miles of their respective coastlines. Prior to the Act, the States at most exercised regulatory jurisdiction over coastal waters between the mainland and the Isles of Shoals. Any boundary that existed merely delimited the areas of each State's jurisdiction, and could not define each State's property interest. Resolution of this case will be the first determinative settlement of the offshore maritime boundary between the two.

It is the conclusion of the Special Master that the straight line projected by the 1740 decree, connecting the midpoint of the closing line of the Gosport Harbor with the point where the geographical middle of the Piscataqua River crosses the closing line of the mouth of the Piscataqua Harbor, is the most appropriate boundary line between Maine and New Hampshire in the disputed waters. This line alone comports with the history, usage, and special circumstances of the area, as well as affording an equitable distribution of, and access to, the area.

Initially, it is essential to confront the claim of the *amici curiae* that, since the 1740 decree did not divide the waters between the Isles of Shoals and Piscataqua Harbor, "the *usage* of people on both sides of the territory to be divided should be the primary consideration in fixing the location of the line." [103] This argument, though superficially intriguing, fails to consider the obvious distinction between seabed ownership and the exercise of regulatory jurisdiction over coastal waters within state boundaries after 1776. As *United States* v. *Maine*, *supra*, has recently reaffirmed, the former is a paramount right of the Federal Government. The latter, however, remains a right of the State so long as it does not unduly burden interstate commerce. In *Corsa* v. *Tawes*, 149 F. Supp. 771 (Md.), aff'd, 355 U. S. 37 (1957), where a Maryland fishing statute was attacked as unconstitutional, the three-judge district court stated:

> "Since the decision in *Manchester* v. *Commonwealth of Massachusetts*, 139 U. S. 240 (1890), it has been beyond dispute that in the absence of conflicting congressional legislation under the commerce clause, regulation of the coastal fisheries is within the police power of the individual states under the doctrine of *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 298 (53 U. S., 1852)." 149 F. Supp., at 773.

See also *Skiriotes* v. *Florida*, 313 U. S. 69 (1940).

The usage that should be first considered is that usage made by the States themselves in the exercise of this regulatory jurisdiction.

Of more significance, the Court has recommended that for purposes of interpreting the Submerged Lands Act "the line marking the seaward limit of inland waters" should be drawn for each State in accordance with the definitions of the Convention on the Territorial Sea and the Contiguous Zone, 15 U. S. T. (pt. 2) 1606, T. I. A. S. No. 5639 (1964). See *United States* v. *Louisiana*, 394 U. S. 11 (1969), at 35–36. If an analogous recommendation were to be made, urging that the Convention be used to determine the boundary that is the subject of this dispute, the offshore maritime boundary between Maine and New Hampshire would be far different from the one that the Special Master proposes. The Convention in Article 12 calls for a median line based upon the equidistance principle when determining the boundary between the territorial seas of States with opposite or adjacent coasts. In this case, Maine and New Hampshire's territories include the Isles of Shoals. This presents the difficult problem of drawing a median line that considers the equidistant points not only from their adjacent coasts but also from the opposite and facing shores of the Isles of Shoals as well. Such a median line would be difficult to draw [104] and nearly impossible to police, but it would settle the boundary definitively.

[103] Brief of *Amici Curiae* (filed Jan. 17, 1975), at 27–28.

[104] See Boggs, *supra*, n. 84, at 190, fig. 26, for an explanation of how such a line would be drawn under the Convention.

Several factors, however, militate against this resolution of the boundary. First, the parties agree that a median line would be "extremely inconvenient and unworkable." Second, the Court in the *California* and *Louisiana* cases, and even in the recent *Maine* case, *supra*, decided different questions than are here involved. Those cases dealt principally with the claims of the coastal States *vis a vis* the Federal Government over ownership of the territorial seas and seabed outside of the three-mile marginal sea. Here, the contest is between two States over seas and seabeds granted to them by the Submerged Lands Act and within the three-mile marginal sea. The Court might properly determine that this case is distinguishable from the earlier ones on this basis and decide that application of the Convention in this case is inappropriate. Third, one of the reasons for determining this boundary is to facilitate in the policing of each State's territorial waters under its respective lobster regulations. Yet, as the parties stipulated about the median line suggested by the Convention: "[S]uch a line . . . would be extremely inconvenient and unworkable from the points of view of law enforcement, navigation and ease of location." [135] Fourth, the Convention itself provides:

> "The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way that is at variance with this provision." Convention, *supra*, at 1610.

Finally, the presence of offshore islands is one of the special circumstances which justifies deviating from a true median line.[136] See A. L. Shalowitz, Shore and Sea Boundaries, Vol. 1, at 232 n. 55.

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[135] See text, *supra*, at nn. 1–2.

[136] "Special configurations of a coast, the presence of islands, the existence of special mineral or fishery rights in one of the states, or the presence of a navigable channel are among the special circumstances which might justify a deviation from a median line." Shalowitz, *supra*, at 232 n. 55.

Accordingly, it is appropriate, even by the Convention's own terms, to disregard the median line based upon the equidistance principle when "historic title or other special circumstances" require it.

Turning then to this case, although historic title to the seas between the mainland and the Isles of Shoals never was held by either Maine or New Hampshire, the "special circumstances" of their coastline, the existence of the Isles of Shoals, and their agreement on the decree of 1740 as the delimitation of their other boundaries direct the adoption of the line proposed by the Special Master. Only the straight line projected between the two harbors in 1740, believed by the Commissioners and the King to divide the Isles of Shoals, satisfies the requirements of the "special circumstances" of this case.

It is appropriate to enumerate these historical and "special circumstances" that direct the adoption of the 1740 projected line. The most significant of these is the fact that both Maine and New Hampshire have accepted the 1740 decree as the delimitation of their other boundaries. This acceptance includes the determination by both States that the 1740 decree fixed the boundaries in both the Piscataqua and Gosport Harbors. Report of New Hampshire-Maine Boundary Commission (1828). Both legislatures, 9 N. H. Laws 943 and Maine Resolves of 1829, at 29, and at least one of the state courts, *State* v. *Wagner*, 61 Maine 190 (1873), have approved of the 1828 Commission's determination in this regard.

The principal "special circumstance" is suggested by the topography of the Maine-New Hampshire coast. The proposed boundary of the Special Master is a line that is nearly perpendicular to the general direction of that coast from Cape Neddick to Great Boar's Head. It is a matter of simple geometry that a perpendicular

line will divide an area, such as this one, more equitably because essentially it divides the surface area into two equal portions. Thus the historicity of the points in the two harbors and the equity of a line that runs perpendicular to the general direction of the coast both support the adoption of the straight line that connects the points in the two harbors.

An additional relevant circumstance is evident from the usage that the States have made of the waters between the Piscataqua and Gosport Harbor. Although the Crown did not claim for itself or grant property interests in the coastal seas along Maine and New Hampshire, it did have authority to exercise its protective police powers in these waters, a function which it in part delegated to the colonies. This delegated power included the regulation of their citizens' fishing, both in the marginal sea as well as in inland coastal waters.[107] It no doubt included policing of the waters with regard to piracy and repelling enemies. When the colonies declared their independence, these protective activities continued to be conducted by the States for State purposes, but they had no property interest ramifications.[108] Until this dispute arose, however, there was apparently no need to delimit between Maine and New Hampshire the respective areas of this police function. It is the view of the Special Master that, if the occasion had arisen, the line which logically would have been chosen would be the line projected through the waters by the 1740 decree of the King. It was from the Crown that this police responsibility derived and it was that line upon which the Crown relied in the decree of 1740 to divide the territory on the mainland and in the Isles of Shoals between the colonies.

Other relevant circumstances which direct the adoption of the boundary proposed by the Special Master are

[107] See text, *supra*, at nn. 96–97; see also Maris, *supra*, at 56–65.
[108] See text, *supra*, at nn. 97–98.

summarized in an observation of the equity and utility of the proposed line. First, the line closely approximates the one agreed upon by the two States in their proposed consent decree. Second, because it is a straight line, the proposed boundary affords ease of demarcation and enforcement. It is interesting to note that the line appears to divide nearly equally the best locations for lobster fishing in the waters, at least as those locations have been marked in the brief of *amici curiae*.[109] Third, the proposed line comports with a combined consideration of the history and usage of the area by the two States and an equitable distribution of the area based upon that history and usage.

Finally, the proposed line is the best of all the alternatives. In making this observation it is necessary to give some consideration to other possible lines which the parties and *amici* have at various times espoused, not as interpretations of the 1740 decree, but as boundaries resulting from usage or acquiescence by operation of law. At one extreme is New Hampshire's original theory, now defended by *amici*, that the so-called "lights on range" line—being an extension to the mouth of Gosport Harbor of a line connecting Fort Point Light and Whaleback Light—must be considered the boundary because New Hampshire lobstermen have been accustomed to determine the approximate location of the boundary by making visual reference to that line.[110] It is argued that the long practice of those who use the area must be given primary consideration, quoting *The Grisbadarna Case*, Scott, Hague Court Reports 121 (1916), as follows:

> "[I]t is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible." *Id.*, at 130.

[109] See Brief of *Amici Curiae* (filed Jan. 17., 1975), at Appendix A.
[110] Complaint of New Hampshire (filed June 6, 1973), at 4.

Yet, as New Hampshire now points out in a subsequent brief,[111] it appears that it was the lengthy, expensive, and unprotested conduct of the central government of Sweden in measuring and placing a lightboat in the challenged region which established a prescriptive line. See 4 Am. J. Int. L. 226, 234–235 (1910). Moreover, in The Case Concerning the Temple of Preah Vihear (*Cambodia* v. *Thailand*), 1962 I. C. J. Rep. 6; 56 Am. J. Int. L. 1033, which *amici* relies on, the court specifically rejected an argument made by Thailand concerning acquiescence based on "local acts" which were not merely acts of private citizens but "the acts of local and provincial authorities." 56 Am. J. Int. L., at 1046.

The conduct relied upon by *Amici* to establish the "lights on range" line as the boundary by acquiescence, long usage, and prescription is simply not the sort of official government conduct which has been held to trigger the invocation of these equitable doctrines. Neither is there merit to Maine's original claim that a line appearing on a U. S. Geological Survey map, Maine-New Hampshire 1 York Quadrangle, Edition of 1920, No. 4300–W 7030/15, has been established as the state boundary by long usage. In its pretrial submission, Maine drew attention to the appearance of this "dog-leg" line on U. S. Geological Survey and U. S. Army Map Service maps in the years 1918, 1920, 1933, 1944, 1949, and 1956, and also on several maps published by various New Hampshire state agencies, such as the Board of Fish and Game Commissioners.[112] Maine argued that:

> "The repetitive publication of that line by such a highly respected, official map agency as the U. S. Geological Survey, without protest by New Hampshire for a period of more than 50 years reflects an implicit acceptance of that line by New Hampshire." [113]

[111] Brief in support of Proposed Consent Decree and In Reply to *Amici Curiae* (filed Feb. 18, 1975), at 4.

[112] Pretrial Memorandum of Maine (filed April 19, 1974), at 18–19.

In evaluating this contention, it is important to look first at the data upon which the U. S. Geological Survey map is based. One is immediately struck by its wholly arbitrary nature, an impression which is strengthened by a letter from the Acting Director of the U. S. Geological Survey, dated June 10, 1966, and addressed to Congressman James Cleveland of New Hampshire, in which this surprising revelation is made:

> "In reviewing topographic quadrangle maps of the area in question, we found no evidence to prove that the Maine-New Hampshire boundary from the mouth of Piscataqua River to the Isles of Shoals is a straight line. Neither have we found any proof that it is a curving line although it is so shown on the now out-of-print special Portsmouth 1:62,500-scale topographic map prepared by the Geological Survey in 1916–17. It was hoped that the original field survey sheets for this map, stored in the National Archives, would provide some documentation as to why the curving boundary was shown. Unfortunately, none was found. Accordingly, we can only conclude that personal interpretations on the part of the field engineer, possibly supported by local opinion, was the reason for the line being shown in that manner.
>
> "On the 1:24,000 scale topographic quadrangle maps of the area, prepared in 1944 by the U. S. Coast and Geodetic Survey for the Army Map Service, the boundary is shown in this same general location although it is more curving in some parts on the 1916–17 map. We believe these minor differences indicate that definite information regarding the boundary location was not available during either survey." [114]

[113] *Id.*, at 19.

[114] Letter from Arthur A. Baker, Acting Director, Geological Sur-

The United States Court of Appeals for the Ninth Circuit once held that:

> "We are unable to agree with the trial court as to the effect which should be given to the hydrographic maps of the United States Coast and Geodetic Survey as evidence in this case. We think the maps should be given full credence, and should be taken as absolutely establishing the truth of all that they purport to show." *United States* v. *Romaine*, 255 F. 253, 254 (CA9 1919).

This respect, even if applicable to Geological Survey maps, does not, however, follow where the aspect of the map in dispute is a boundary, for that involves legal and historical matters quite outside the expertise of such agencies. The Special Master concludes that the mere appearance on a map of a boundary line—grounded only in the imagination of some nameless draftsman—is not enough to raise prescriptive rights in one State. This is nonetheless true where such a line appears on several maps published by New Hampshire agencies, for these are minor and fairly recent acts which simply do not rise to the heights necessary to call into play the doctrine of acquiescence. Moreover, it should be noted that there are maps of greater age in which the state boundary is portrayed as a *straight* line from Portsmouth Harbor to Gosport Harbor. See Chace, "Map of Rockingham County, New Hampshire" (1857); Rand, McNally & Co., "Map of New Hampshire" (1895); *id.*, editions of 1898 and 1899; Geo. Walker & Co., "Map of New Hampshire" (1893).[115]

It is the conclusion of the Special Master that no further evidentiary hearings on this dispute are necessary

vey, U. S. Department of the Interior, dated June 10, 1966; printed as Appendix A, Rebuttal Brief by the Plaintiff in Support of Its Motion for Preliminary Injunction (filed June 21, 1973).

[115] These maps are available at the Geography and Map Division, Library of Congress.

to examine any claim of acquiescence or prescription, since the issues originally raised by the parties and currently raised by *amici* are wholly insubstantial, even if the allegations regarding the "lights-on-range" line and the U. S. Geological Survey Map were proved. Because the lateral marine boundary between Maine and New Hampshire extending from the Piscataqua River to the Isles of Shoals should be that one suggested by the 1740 decree, the boundary is hereby found to be as set forth in Part 4 of this report.[116]

Respectfully submitted,

TOM C. CLARK,
Special Master.

October 8, 1975

[116] Of course, provision should be made for marking the boundary. The Special Master approves of the language of Paragraph 13 of the consent decree for that purpose:

"(13) Provision shall be made for installation and maintenance of suitable markers and/or navigation aids and devices to locate and mark the boundary as settled, subject to any applicable federal regulations, the costs of which shall be shared equally by the two States. The parties hereto shall within 180 days after the entry of this judgment file a stipulation with this Court indicating the points and locations at which such markers and/or navigation aids and devices are to be located and the kinds of markers and/or navigation aids and devices agreed upon. . . ."

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

October Term, 1975

No. 64, Original

The State of New Hampshire, Plaintiff

v.

The State of Maine, Defendant

EXCEPTIONS AND BRIEF OF THE PLAINTIFF

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* * * *

Appendix A, Excerpts from Convention on the
Territorial Sea and Contiguous Area, and
Convention on the Continental Shelf.
Appendix B, Illustrative map of Portsmouth Harbor

In the
Supreme Court of the United States

October Term 1975

No. 64, Original

The State of New Hampshire, Plaintiff

v.

The State of Maine, Defendant

EXCEPTIONS AND BRIEF OF THE PLAINTIFF

INTRODUCTION

The issue in this case is the determination of the location of the lateral marine boundary between New Hampshire and Maine in the area of the Atlantic Ocean lying between the mouth of Portsmouth Harbor on the mainland and the entrance to Gosport Harbor in the Isles of Shoals (the latter being a group of islands lying about six miles offshore).

Plaintiff raised this issue by its motion for leave to file complaint against defendant, filed in this Court June 6, 1973, which motion was granted by the Court November 5, 1973 (414 U.S. 810). The defendant filed an answer denying the claims of the plaintiff and setting forth several alternative claims as to the

proper location of the boundary in question. The matter was referred to Honorable Tom C. Clark as Special Master on November 5, 1973 (414 U.S. 996). His report dated October 8, 1975, is the result of that referral.

Pretrial proceedings were held in April 1974 to narrow the issues in preparation for a trial scheduled to begin August 12, 1974. Between April and the scheduled trial date, the Attorneys General of both states, at the urging of the Special Master, reached a tentative settlement of the dispute which on September 23, 1974 they filed with the Special Master in the form of a motion for entry of judgment by consent.

On September 20, 1974 the New Hampshire Commercial Fishermen's Association sought leave to intervene in the case in opposition to the proposed consent decree, and, although denied status as a party, it was permitted to proceed as *amicus curiae*, and did so, filing several briefs and memoranda of law on the principal issues, as did the parties. On February 25, 1975, the parties filed a stipulation incorporating in the record "for decision of this action" various documents and maps and agreeing that judicial notice might be taken of a wide variety of maps, state papers, government publications, ancient historical documents and reputable works of history.

In his report the Special Master concluded that the proposed consent decree ought to be rejected and then proceeded to decide the case on the basis of the stipulated record without further evidentiary hearings.

The boundary line proposed by the report is a straight line connecting the middle of the mouth of Portsmouth Harbor with the middle of the mouth of Gosport Harbor in the Isles of Shoals. In determining the location of the two terminal points of this boundary line, the Special Master rejected the "thalweg principle" on which the proposed consent decree had been based and ruled that "the geographic middle" of the mouth of each harbor should be used in place thereof. The Special Master also ruled that the closing lines of the mouths of the two harbors were located at points somewhat different from those recommended in the proposed consent decree, in each case closer to the interior of the harbor.

New Hampshire has taken no exception to the rejection of the proposed consent decree. The reasons advanced by the

Special Master for ruling in favor of its rejection are considered largely unanswerable. Further, New Hampshire has suffered no prejudice from this ruling, since the boundary now proposed by the Special Master is more favorable to it than that recommended in the proposed consent decree.

We agree with the Special Master's rulings that a median line should be used to determine "the geographic middle" of the mouth of each harbor, that the mouth of each harbor is located on a closing line connecting the headlands, and that there should be a straight-line boundary across the open sea connecting the two terminal points. We are also satisfied with his ruling locating the middle of the mouth of Gosport Harbor.

Our exceptions, set forth below, are limited and relate solely to the Special Master's choice of the point where the median line intersects the closing line of Portsmouth Harbor and the methods used to make this choice.

In our view, the chief error in the Special Master's method of drawing the median line at the mouth of Portsmouth Harbor is in the use of "low tide elevations" in the River as points of reference. By "low tide elevations" (as distinguished from islands), we mean areas of land or rocks which are completely submerged at high tide but are surrounded by and above water at low tide. See *United States* vs. *Louisiana*, 394 U.S. 11, 60. The Special Master acknowledges and seeks to justify his use of "low tide elevations" in calculating the median line (Report, pp. 42-43, note 84). His use of a "low tide elevation" at Whaleback Reef in Portsmouth Harbor as a point of reference is, in New Hampshire's view, particularly erroneous and prejudicial to its position. Had this "elevation" not been used, then the median line would have crossed the closing line of Portsmouth Harbor approximately 350 yards to the northeast of the site chosen in the report (Report, p. 43), thus advancing the entire lateral marine boundary accordingly, in a northeasterly direction.

EXCEPTIONS

The State of New Hampshire excepts to the following findings of fact and rulings of law in the Master's Report:

1. "The use of . . .low tide elevations in the Piscataqua River

is recommended by several factors." (Report, p. 42, note 84).

2. "The significant points in the Piscataqua Harbor are those low-tide elevations and low water lines on either side of the harbor that are nearest each other; the low water line at Odiornes Point and rocks that expose at low tide off Jaffrey Point, and in Whaleback Reef" (Report, pp. 42-43, note 84).

3. "Therefore, in this case, it (the geographic middle) is at approximately 43°3' 1.7" North and 70° 42' 8.0" West" (Report, p. 43).

4. Consistent with pars. 1, 2 and 3 above, exception is also taken to the location of the boundary line marked "Maine /New Hampshire" on the National Ocean Survey Chart, C.&G.S., No. 211, filed with the Report.

ARGUMENT

I.

THE USE OF "LOW TIDE ELEVATIONS" IN CALCULATING THE POSITION OF THE MEDIAN LINE AT THE MOUTH OF PORTSMOUTH HARBOR WAS ERRONEOUS.

(a) The Royal Decree of 1740 Does not Delimit the "Middle of the River" by Reference to Low Tide Elevations.

The language of the royal decree must be construed with reference to the facts on which the decree was based and the circum stances under which the language was used. 21 C.J.S., Courts, § 222, p. 409-411; *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); *The Grisbadarna Case*, in Scott, The Hague Court Reports (1916) 12 at 127. See also, *United States* v. *Wise*, 370 U.S. 405, 411 (1962). Therefore, as the Special Master concluded, the phrase "middle of the river" occurring in the 1740 decree must be interpreted in accordance with the facts and circumstances existing in 1740. (Report, pp. 40-42).

So far as New Hampshire has been able to determine, the low tide elevations in question are not shown on any chart or map submitted by the parties or by *amicus curiae*, nor on any other chart or map published prior to, contemporaneous with, or within a reasonable time after the 1740 decree. As the Special

Master concluded, in another connection, "it cannot be said that uncharted 'rocky reefs' or later navigational aids could have played any part in the deliberations of the King and Commissioners" (Report, p. 36).

The "middle of the river", which constituted the boundary between the states from and after the 1740 decree, and which constitutes the boundary to this day, was therefore determined without reference to low tide elevations. Since the present river boundary is the one established by the 1740 decree, it should not be drawn with reference to the low tide elevations, and neither, perforce, should the intersection of the middle of the river with the closing line of the harbor.

(b) The Median Line Must be Measured from the Banks of the River and Not from Low Tide Elevations.*

The Supreme Court has established that the median line of a river is the line which is "midway between the main banks of the river." *Georgia* v. *South Carolina*, 257 U.S. 516, 523 (1922). In *New Jersey* v. *Delaware*, 291 U.S. 361, 379 (1933) the median line was described as the line "halfway between the banks". The median line was defined in *Arkansas* v. *Mississippi*, 250 U.S. 39, 43, 45 (1919) as "the line equidistant between the banks [of the river]." In 8 *Opinions of the United States Attorney General* 175, the Attorney General opined that the line of the middle of a river is the middle of the river bed, between the banks of the river.

That the median line is fixed by reference to the main banks of the river is universally supported by other authority. See 1 McNair, Oppenheim's International Law (1928), 425; 2 Shalowitz, Shore and Sea Boundaries (1964), 374, note 30.

It was recognized in *Georgia* v. *South Carolina*, 257 U.S. 516, 523 (1922) that in certain circumstances the bank on an island in the river may be used in determining the median line. However, this exception to the general principle has been applied only in the case of islands, and not in the case of low-tide elevations.

The measurements of the median line from the main banks of the river (or, where applicable, from islands in the river) applies the underlying theory of the median line principle: that each riparian state owns half of the water and bed of the river. *Ingraham* v. *Wilkin son*, 4 Pick. (21 Mass.) 268 (1826); *United*

* See definition in *U.S.* v. *California* 382 U.S. 448, 450, and Appendix A of this brief.

States v. *Elliott*, 131 F. 2d 720 (10th cir., 1942); *Hardin* v. *Jordan*, 140 U.S. 371 (1891); *Wisconsin* v. *Michigan*, No. 12, Orig., Supple mental Report of Special Master, 7 (the practice applies "the rule of equality of water area . . ."); Cukwurah, The Settlement of Boundary Disputes in International Law (1967), p. 50; Glos, International Rivers (1961) 110; 93 C.J.S., Waters, §71, p. 745-746. The "river" is all of the water and the subsoil between its banks. Wisdom, The Laws of Rivers and Watercourses (1962) 3; and the banks of the river border and enclose the river. *Oklahoma* v. *Texas*, 260 U.S. 606, 631 (1923); *Mammoth Gold Dredging Co.* v. *Forbes*, 104 P. 2d 131, 137 (Cal., 1940); *Seibert* v. *Conservation Commission of Louisiana*, 159 So. 375, 377 (La., 1935); Wisdom, *supra*, 10-11, 38-40.

In the instant case, the water flowing between Whaleback Reef and Gerrish Island is as much part of the river as is the water between the reef and the New Hampshire bank. Whaleback Reef does not border or enclose the river; it is located almost one-third of the way into the river from the Maine shoreline; and the waters between the Reef and the Maine shoreline and adjacent islands are sufficiently deep, are naviga ble and in fact actively navigated, and are not inextricably linked to the mainland. To measure the median line from low tide elevations in the Reef, rather than from the banks of Gerrish Island or Wood Island, gives Maine much more than half of the river water, and New Hampshire much less. The same result obtains with respect to the river bed. Low tide elevations are a part of the river bed. *United States* v. *Ray*, 423 F.(2d) 16, 20 (5th Cir., 1970); *Oklahoma* v. *Texas*, 260 U.S. 606, 631, 632; *Alabama* v. *Georgia*, 64 U.S. 505, 515; *United States* v. *Chicago etc. R. Co.*, 312 U.S. 593, 597; 1 Shalowitz Shore and Sea Boundaries (1962) 228. To measure a median line from a point in the bed, rather than from its edge (i.e., the banks of the river on the mainland or an island) has the obvious effect of giving Maine more than half of the bed and New Hampshire less than half.

The measurement of the median line from low tide elevations therefore does violence to the principle underlying the median line rule; that each riparian state should receive half the river and river bed. It produces a "distorted and anomalous" situation (Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea", 8 Internation al and Comparative Law Quarterly 73, 85 note 30 (1959)), and violates "the major community policy at stake" with respect to boundary problems of opposite states: "that of achieving equitable apportionment". McDougal & Burke, Public Order of the Oceans (1962), p. 428. See also Pearcy, "Geographic Aspects of the Law of the Sea", 49 Annals of the Association of American Geographers (1959) 1, 16.

A former Geographer of the United States Department of State has squarely addressed the issue of whether a median line between opposite coasts may be drawn from offshore formations. Boggs, "Delimitation of Seaward Areas Under National Jurisdiction", 45 American Journal of International Law, 240, 257-258 (1951). He states,

> "Islands in a lake, gulf or bay may complicate the determination of the base line employed in laying down the median line. Because islands, large and small, are found both near and far out from coasts in water bodies of all sizes and shapes, it seems incontrovertible that *the median line should, as a general rule, be derived as nearly as proves feasible only from the mainland coast.* [emphasis supplied]
>
> "Obviously, some islands must be treated as if they were part of the mainland. The size of the island cannot in itself serve as a criterion as it must be considered in relation to its shape, orientation and distance from the mainland. The most reasonable and workable rule is believed to be to draw *that pair of parallel lines* tangent to opposite ends or sides of the island which encloses the *least area of water* between island and mainland. . . . Then, if the land area of the island (properly planimetered from the low tide shoreline) exceeds the water area bounded by the parallel lines, the island and mainland, the island should be reckoned as if part of the mainland base line, in laying down the median line. . . ." At p. 258. See the illustration of the median line technique in fig. 3, p. 257.

Although Boggs' analysis dealt with off-shore islands, his reasoning applies even more forcefully to low tide elevations. Such formations should be disregarded in drawing the median line unless they are so integrally related to the mainland as to constitute part of the coast.

(c) The Low Tide Elevation in Whaleback Reef Is Not Part of the Bank of the River.

The line of the middle of the river is the line which is midway between the banks of the river. The term "banks" has been variously defined, but it is clear that the banks are the areas which border, enclose and confine the river. See 2 Shalowitz, *supra*, at 373, and the authorities there cited. See also, *Howard* v. *Ingersoll*, 17 Ala. 781 (1851); Wisdom, *supra*, 10-11. In no way can any of the low tide elevation in Whaleback Reef be said to border and enclose the river.

At issue here is whether these elevations should be assimilated to the bank of the river so as to be treated as part of the bank. They cannot be so treated. In *United States* v. *Louisiana*, 394 U.S. 11 (1969) the Supreme Court considered whether certain islands could be consid ered the headlands of bays. 394 U.S. at 60-66. This depended on whether the islands in question were "so integrally related to the main land that they are realistically part of the 'coast' . . ." 394 U.S. at 66. In this connection the Court stated:

> "While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast." 394 U.S. at 66.

Using the "island" analogy, the elevation at Whaleback Reef is small; in fact, it is merely the tip of a rock which protrudes at low tide. The same is true of every other elevation in the Reef. The elevation therefore does not meet the size criterion in the above quotation from *United States* v. *Louisiana*. Shalowitz in his treatise, 1 *supra* at 161 note 125 says:

> "The coastline should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, or they form an integral part of a land form."

Furthermore, the elevations in the Reef must be considered individually, rather than in relation to each other, in a "leap-frogging" manner, or as a unit. See *United States* v. *Louisiana*, No. 9, Orig., Report of Walter P. Armstrong, Jr., Special Master, 41. It is not the entire reef which is to be considered, but merely the individual rock or rocks which protrude at low tide. The "reef" consists of these individual rocks.

The low tide elevation used by the Special Master at Whaleback Reef is nearly one-third of the way into the river as measured from the nearest point on the coastline of Gerrish Island. A formation this far into the river cannot be considered part of the bank of the river.

The waters between the elevations in the reef and Gerrish Island (as well as the waters between the reef elevations and Wood Island) are up to eighteen feet deep, are navigable, and are in fact frequently navigated by vessels as large as 65 feet. See Pearcy, *supra*, 1 at 9. There is no inextricable and integral relationship between the waters and the shore. Finally, the elevations significantly depart from the general direction and curvature of the coastline on Gerrish Island.

The elevations in question therefore do not satisfy any of the criteria established by the Supreme Court in *United States* v. *Louisiana*, *supra*, for determining whether such formation should be considered part of the coastline. The Special Master, *supra*, using the criteria established by the Supreme Court in *United States* v. *Louisiana*, 394 U.S. 11, 66 (1969), concluded that certain low tide elevations along the Louisiana coast could not be assimilated to and treated as part of the mainland. See Report of Walter P. Armstrong, Jr., Special Master, 37, 38, 41, 52-53, in same case.

Moreover, the use of these elevations does not satisfy the test established by Boggs, *supra*, at pp. 257-258, for determining whether a particular off-shore formation can be treated as part of the mainland for the purpose of drawing a median line. The area of the elevation at Whaleback Reef, and indeed, the area of the entire reef, is far less than the water area between the elevation or reef and the shore on Gerrish Island.

Although the Special Master used a rock exposed at low tide off Whaleback Reef rather than the main ledge of the reef where the light house stands, as the point of reference of which we complain, history shows that the low, small main ledge of Whaleback Reef itself has been very precarious and exposed perch for the lighthouse, which has several times been destroyed or severely damaged by wave action because of the low, small profile of the ledge on which it stands—a further reason for not considering any part of the reef to be associated with the river bank. See E. R. Snow, Lighthouses of New England (New York 1973) chapter 21.

The low tide elevation at Whaleback Reef therefore cannot be treated as part of the river bank, and should be ignored in drawing the median line.

The conclusion of the Special Master that the median line may be drawn from low tide elevations should not carry with it the assumption that the Special Master implicitly made the necessary factual findings to support his conclusion. This issue first appeared in the case as a footnote in the Special Master's Report (Report 42, note 84). It was never addressed by the parties, and no evidence was ever presented thereon. The Special Master's conclusion is based on his general assumption, which the State of New Hampshire maintains is erroneous, that low tide elevations are juridically the same as islands, and in all cases can be used to draw a median line, regardless of whether the criteria established in *United States* v. *Louisiana*, *supra*, or set forth by Boggs, *supra*, have been met.

(d) The Practice in Drawing Median Lines in Rivers Has Been to Ignore Low Tide Elevations.

Median lines in boundary waters between states of the United States, and between countries, have in practice been drawn without reference to low tide elevations. The most recent example in this country is the boundary line established in

Texas v. *Louisiana*, No. 36, Original (1975). The Special Master in that case established as the boundary line in Sabine Lake and Sabine Pass, which divide Texas and Louisiana, "the median line marked on Louisiana Exhibits DDD and III. . . ." Report of Special Master, p. 48. These exhibits are kept in the storage area in the Supreme Court Building, in Box 7 of the Exhibits in *Texas* v. *Louisiana*, No. 36, Orig. An examination of these exhibits and an analysis of the line therein, by plotting with dividers, reveals that the median line was measured from the low water mark on the actual banks of the lake and pass, without reference to offshore islands and marshes.

The proceedings in *Wisconsin* v. *Michigan*, No. 12 Orig. (1935), also demonstrate this practice. At issue in that case was the boundary line in Green Bay. The Supreme Court had previously concluded that the boundary was to be the geographic middle of the bay (295 U.S. 455, 462 (1935), and referred the case back to the Special Master for the purpose of drawing the line in accordance with the Court's decree. A chart was filed with the Special Master on which were drawn two lines—one labeled "Nearest Land Method", and the other labeled "Mid-section Method". See War Department, Coast Chart No. 2, "West Shore of Lake Michigan", on file in the Cartography Division, National Archives, Washington, D.C. It is clear from an analysis of the "Nearest Land Method" line that this is the median line which is everywhere equidistant from the land (including associated islands) of the opposite states. It is the median line drawn in accordance with the same principles which should govern the instant case.

From analyzing and plotting this line with dividers, it is clear that it was drawn without regard to "low tide" elevations in the bay. The line was drawn without regard to Horseshoe Reefs, off the Wisconsin coast, and goes directly through Whaleback Shoal, to the north of Horseshoe Reefs. The line was also drawn without regard to Eleven Foot Shoal, Corona Shoal, Minneapolis Shoal, North Drisco Shoal and Drisco Shoal, which are located in the vicinity of 45° 33' North and 86° 58' West, and St. Martin's Shoals, located in the vicinity of 45° 27' North and 86° 46' 20" West. It is therefore apparent that this median line was drawn by measuring from the coastline of the mainland and associated islands, and that "low tide" eleva-

tions were ignored.

The "Mid-section Method" line equally divides the water area bordered by the banks on the mainland, and ignores islands in the bay. It is clear that this line too, was drawn without regard to "low tide" elevations.

The boundary line reported by the Special Master in that case appears on War Department Chart No. 70, "North End of Lake Michigan", on file in the Cartography Division, National Archives, Washington, D.C. A smaller copy appears at "Exhibit B" appended to Supplemental Report of Special Master, on file in the National Archives. The Supple mental Report of the Special Master was accepted by the Supreme Court at 297 U.S. 547 (1936).

The Special Master noted, at page 8 of his Supplemental Report, that line BX on the Chart was "the exact geographical center of the bay" in that portion of the bay. An analysis of this line with dividers makes it clear that this line was drawn without regard to "low tide" elevations, particularly the "rock awash" located at 45° 5' 30" North and 87° 19' 20" West, near the Wisconsin coast. It also ignored Strawberry Islands, to the northeast of the "rock awash". (Although the Special Master found that this line represented the exact geographic center of the bay, he could not adopt it as the boundary because it traversed Chambers Island, which belonged wholly to Wisconsin. He therefore adopted line BC as the boundary in that portion of the bay, point C being adjacent to point X.).

The Special Master continued the boundary line in the bay by drawing line CK, point K being "practically in the center of the bay". (Supplemental Report of Special Master, p. 9). This is the case when that point is measured from the mainland, rather than from Strawberry Islands and Horseshoe Reefs, off the Wisconsin coast.

The Special Master next drew line KL, which he stated, at page 9, to be "almost exactly in the geographical center of the bay". This line represents the geographic median line measured from the mainland, without regard to Horseshoe Reefs and Whaleback Shoal.

The above cases demonstrate the practice in drawing median lines in rivers and inland waters between states to draw such lines by reference to the actual shore line on the mainland or

associated islands, and to ignore "low tide" elevations.

This is also the practice in drawing international frontiers in boundary rivers. In the treaty between El Salvador and Guatemala, April 9, 1938, the median line in the rivers between the two countries was established as the boundary. United States Department of State, Office of the Geographer, International Boundary Study No. 82-El Salvador-Guatemala Boundary (1968). The official maps drawn by the Joint Frontier Commission pursuant to and implementing the treaty show that the median lines were drawn midway between the banks, and ignored elevations in the rivers. See Mapas que Acompanan a Informe Rendido a los Respectivos Gobiernos por la Comision Mixta de Limites entre Guatemala y el Salvador (1942), especially Hoja No. 5-Secion de Suriano a Ocean Pacifico.

The frontier between France and Switzerland in Lake Geneva is the median line of the lake, which is "defined by the locus of the centers of circles enscribed between the Swiss and French banks". United States Department of State, Office of the Geographer, International Boundary Study No. 11, France-Switzerland Boundary (1961), p. 3.

It is clear, then, that in drawing median boundary lines in internal waters, these lines in practice are measured from the banks on the mainland or islands, and "low tide" elevations are ignored.

II.

THE SPECIAL MASTER HAS MISAPPLIED INTERNATIONAL LAW IN USING LOW TIDE ELEVATIONS IN PORTSMOUTH HARBOR TO CALCULATE THE MEDIAN LINE.

(a) The Rule that Low Tide Elevations Should Be Ignored in Drawing the Median Line is Consistent with the Territorial Sea Convention.

It has been explained that it is permissible to depart from the principle that the median line in a river is to be measured from the true banks of the river, and to measure the line from off-shore formations, when, because of the geographic nature

of the formation, its close proximity to the mainland, and the close affinity of the formation and the intervening waters to the mainland, the formation should be treated as part of the bank of the river. This principle is in accord ance with rules established in the Geneva Convention of the Territorial Sea and the Contiguous Zone (1958).

Article 3 of the Convention provides that "[e]xcept where otherwise provided in the Articles, the normal baseline for measuring the breadth of the Territorial Sea is the low water line along the coast...." This rule that the baseline (which is the line which divides internal waters and the Territorial Sea: Art. 5 (1) must follow the actual coastline may be departed from in "localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity...." In such situations, straight baselines may be drawn between appropriate points. Art. 4 (1). However, "[T]he drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters". Art. 4 (2). Mcreover, it is specifically provided that straight baselines "shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them". Art. 4 (3).

The scheme in the Convention therefore permits a departure from the actual coastline when the geographic circumstances mentioned in Article 4 (1) exist. But even when such geographic justification exists. speci fic baselines must be drawn in accordance with the criteria in Article 4 (2) and (3). These criteria ensure that baselines will be drawn only to and from those points which are so integrally related to the mainland that they should realistically be considered part of the coast.

Low tide elevations are specifically excluded as points to and from which straight baselines may be drawn. The reason for this was explained by the International Law Commission in its Commentary to its Draft Article 5, which was the basis of the convention Article 4:

> "Straight baselines may be drawn to islands situated in the immediate vicinity of the coast but not to drying rocks and drying shoals. Only rocks or shoals permanently above sea level may be used for this purpose. *Otherwise the distance between the baselines and the coast might be extended more than is required to fulfill the purpose for which the straight baseline method is applied*, and, in addition, it would not be possible at high tide to sight the points of departure of the baselines." Commentary (8), p. 15. [Emphasis supplied]. (Report of the International Law Commission, Eighth Session (1956) Gen. Ass. Off. Rec., 11th Sess. Supp. No. 9 (A/3159) pp. 13-15)

The Commission's point with respect to the portion italicized above is that when straight baselines are drawn to and from off-shore formations, the waters landward of the baselines become internal waters [Territorial Sea Convention, Art. 5 (1)], and the nature of low tide elevations, and their relationship with the mainland, are not such as to justify creating such an extended zone of internal waters.

McDougal and Burke also explain that "it is not normally expected that [a low tide evelation] has any particular use to the local population; nor can it realistically be considered as a dependable landmark for interested mariners." Public Order of the Oceans (1962), p. 388.

It therefore appears that the rationale of the Convention prohibition of drawing straight baselines to and from low tide elevations is that such formations, being merely barren rocky points protruding at low tide, of no particular use to the local population, and unsatisfactory for use by mariners, are not so integrally related to the actual coast as to warrant departing from the coastline and extending internal waters to baselines drawn to and from the elevations. Nor are the waters between the elevations and the mainland sufficiently linked to the land domain to constitute internal waters.

For the same reasons, and by analogy to these convention principles, low tide elevations cannot be considered part of the coast for the purpose of drawing a median line. The existence of a lighthouse on one of the elevations in Whaleback Reef does not justify using this elevation as a point from which to measure the median line, since, for reasons explained in the previous

section (that the criteria set forth in *United States* v. *Louisiana*, *supra*, and by Boggs, *supra*, were not satisfied), the elevation is not so integrally related to the bank of the river as to be treated as part of the bank.

The conclusion of the Special Master in the instant case relative to the use of low tide elevations (Report, p. 42 note 84) is based upon an erroneous application of the precise Convention rules which govern the delimitation of the *Territorial Sea* between opposite coasts, to the establishment of the median line in *internal waters*, i.e. the river. The relevant rules in the Territorial Sea Convention which the Special Master implicitly applied in the instant case are the following:

> *Article 12(1)*: "Where the coasts or two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its terr itorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured . . ."

> *Article 11(1)*: "Where a low tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea."

For a discussion of the factual and juridical differences between internal waters and the territorial sea, see *United States* v. *Louisiana*, 394 U.S. 11, 22 (1969). Waters on the landward side of the baseline of the territorial sea are internal waters [Territorial Sea Convention, Art. 5 (1)]; and the baseline of a river is the line drawn across its mouth between points on the low tide line of its banks [Territorial Sea Convention, Art. 13]. A river is part of a state's internal waters.

There is a distinction between applying the median line rule to the delimitation of river boundaries as opposed to territorial sea boundaries.

> "Because of the relationship between seaward boundaries not merely to the coastal States involved but to the international community which utilizes and depends upon the adjacent high seas, international law has specifically recognized different rules for delimiting the boundaries of the States adjacent to those waters." *Texas* v. *Louisiana*, No. 36, Orig., Brief for the United States in Response to Texas' Brief in Support of its Exceptions to the Report of the Special Master, filed September 15, 1975.

The International Law Commission recognized in its Commentary to its Draft Article 12, which was the basis for the Convention Article 12, that the rules therein "cannot be applied in all circumstances" and that internal waters could be subject to different rules. Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159), p. 18. The precise rules in Article 11 and Article 12 are meant to apply to offshore boundaries, and not necessarily to those in internal waters.

> "International boundaries to distinguish offshore sovereignty and rights are limited to those extending through the territorial sea and over the continental shelf. In internal waters any international boundaries are integral parts of those of the adjoining land area, hence not definable as offshore." Pearcy, *supra*, note 15, at p. 16.

The error made by the Special Master was to apply to the boundary in the Piscataqua River the rules that the outer limit of the territorial sea may be measured from low tide elevations within the territorial sea (Territorial Sea Convention, Art. 11(1)), and that therefore the median line *in the territorial sea* may be measured from these elevations (Art. 12(1)). See Report, p. 42, note 84. That low tide elevations may be used for drawing the median line in the territorial sea in no way implies that they can therefore be used for drawing the median line in internal waters. In fact, an analysis of Articles 11 and 12 reveals that the opposite is in fact the case. It will become clear in the ensuing discussion that the confusion, which has been recog-

nized to exist by the International Law Commission itself and by other commentators, arises from the "unfortunate" use of the phrase "as the baseline" in Article 11.

The history of Article 11 (1) reveals that its intent is that when a low tide elevation is located within a state's territorial sea as measured from the actual coastline, the elevation has its own territorial sea, and will thus cause a bulge in the territorial sea of the state

An early version of Article 11 provided,

> "Elevations of the sea-bed which are only above water at low tide and are situated partly or entirely within the territorial sea shall be treated as islands for the purpose of determining the outer limit of the territorial sea." Francois, "Second Report on the Regime of the Territorial Sea", International Law Commission, Fifth Session (1953), U. N. Doc. A/CN. 4/61, p. 30, Art. 5 (1)

The comment of the Rapporteur with respect to this provision stated that,

> "a distinction is drawn between islands and drying rocks. . . .[A]n island has its own territorial sea; *a drying rock is deemed to be an island for this purpose only if it is situated partly or entirely within the territorial sea extending along the coast*. A drying rock situated outside the territorial sea is not regarded as having its own territorial sea. "[Emphasis supplied] Francois, *supra*, p. 33-34.

This Article was amended during the same session of the International Law Commission to read as follows:

> "Article 5: (1) As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast. . . . (3) Drying rocks and shoals that are exposed between the datum of the chart and high water if within the territorial sea, *may be taken as individual points of departure for measuring the territorial sea, thus causing a bulge in the outer limit of the latter.*" [Emphasis supplied].

> Francois, "Addendum to the Second Report on the Regime of the Territorial Sea", International Law Commission, Fifth Session (1953), U. N. Doc. A/CN. 4/61/ Add. 1, Art. 5, pp. 5-6.

Immediately following these provisions was Article 5a, which permitted the drawing of straight baselines in areas where the coast was deeply cut into or where there were islands in its immediate vicinity, but stated that "baselines should not be drawn to and from drying rocks and shoals". Francois, "Addendum . . .", supra, at p. 6. The distinction here being developed is between the concept that low tide elevations within a state's territorial sea have their own territorial sea, thereby causing a bulge in the state's territorial sea (which is permitted), and that of using low tide elevations for drawing straight baselines and thereby extending internal waters (which is not permitted).

The following Articles appeared in later versions of the Draft:

> "*Article 11.* Every island has its own territorial sea. An island is an area of land surrounded by water which is permanently above high water mark. . . ."
> *Article 13.* Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea."
> Francois. "Third Report on the Regime of the Territorial Sea", International Law Commission, Fifth Session (1954), U. N. Doc. A/CN. 4/77, p. 12-13.

The comment to Article 13 stated, at page 13:

> "A distinction has been made between islands and drying rocks. An island off the coast, even if situated outside the territorial sea, always possesses a territorial sea of its own. A drying rock is only deemed an island in this respect when situated wholly or partly within the territorial sea along the coast. A drying rock lying outside the territorial sea pos-

sesses no territorial sea of its own."

The following year, the International Law Commission redrafted the relevant portion of its previous Article 5, and designated it Article 12:

> "Drying rocks and shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea." Report of the International Law Commission covering the work of its Sixth Session (1954), Gen. Ass. Off. Rec., 9th Sess., Supp. No. 9 (A/2693), p. 16.

The Commentary to this Article further explained it, and dealt with suggestions that it might be inconsistent with the rule in a previous article that straight baselines may not be drawn to and from drying rocks:

> "Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will accordingly make allowances for the presence of such drying rocks and will jut out to sea off the coast. Drying rocks and shoals however which are situated outside the territorial sea have no territorial sea of their own.'
>
> 'The Commission considers that the above Article expresses the international law in force.'
>
> 'It was said that the terms of Article 5 (under which baselines are not drawn to or from drying rocks and shoals) might perhaps not be compatible within Article 12. The Commission does not consider them incompatible. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks are treated as islands in every respect. If they were, then, so far as the drawing of baselines is concerned, and in particular in the case of shallow waters off the coast, the distance between the baselines and the coast might conceivably be far in

> excess of that intended to be laid down by the method of these baselines." Report. . . . *supra*, at p. 16.

Rapporteur Francois, who authored the Article, made the following significant comment:

> "The gist of [the Article] was that a drying rock within T miles of the coast (where T = breadth of the territorial sea) could serve to extend the territorial waters by causing a bulge in the outer limit of the latter. . . ." International Law Commission, Sixth Session, Summary Record of 260th Meeting (1954) U. N. Doc. A/CN. 4/SR-260, p. 14.

As to whether this Article conflicted with the provisions regarding baselines, he stated, at page 16:

> "Article 13 embodied a general principle, whereas Article 6 referred to a special case.
>
> Article 13 laid down the general rule *for measuring the territorial sea from the normal baseline*, namely the low water line. For that purpose, rocks emerging at low water were to be taken into account provided, of course, that they were less than T miles from the shore. Article 6 was concerned with the exceptional case in which a state, because of its deeply indented coast, was allowed the special privilege of simplifying the perimeter of its territorial sea by drawing straight baselines as an artificial substitute for the normal baseline (low water line) because the latter would be too sinuous. Its provisions were therefore framed restrictively. If forbade the drawing of straight baselines to and from the banks and rocks emerging only at low tide."

The Commentary to Article 11 states:

> "Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges ac-

cordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own."

The Final Report of the International Law Commission [Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159)] contained the following provisions:

"Baselines shall not be drawn to and from drying rocks and drying shoals." [Art. 5 (1); this eventually became Convention Art. 4(3)]."

"Every island has its own territorial sea. "[Art. 10; eventually Convention Art. 10 (2)]"

"Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extention of the territorial sea." (Art. 11; eventually Convention Art. 11).

The Commentary to this Article stated, at p. 17:

"Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own."

These excerpts from the proceedings of the International Law Commission are set forth in detail in order to show conclusively the true meaning of Article 11, and its relationship to Articles 4 and 12. Article 11 expresses the principle that when a low tide elevation is situated within the territorial sea as measured from the actual coastline, it possess its own territo-

rial sea, and accordingly causes a bulge in the territorial sea of the coastal State. This principle is represented pictorially at 1 Shalowitz, *supra*, at p. 226, and 2 Shalowitz, *supra*, at pp. 379-380; and in Pearcy, *supra*, at p. 9. On the other hand it is quite clear that low tide elevations cannot cause an extension of internal waters. This is clear from Article 4, which prohibits the drawing of straight baselines to and from low tide elevations, and which permits internal waters to be extended to other off-shore features only when such features are so integrally related to the coastline as to constitute a part thereof. As McDougal and Burke state,

"[T]he provision in Article 11 was not intended to authorize drawing of baselines from or to a drying rock or to create internal waters by the authorization contained in this Article." Public Order of the Oceans (1962), p. 394.

"What the Article authorized in this interpretation, was only extension of the outer limit of the territorial sea and this does not require laying down baselines. *Nor does it necessitate regarding areas landward of the drying rocks as internal waters.* This appears to have been the result sought by the [International Law] Commission." (Emphasis supplied.) Ibid., at p. 394, fn. 237.

"[Article 11] deliberately emphasizes that the purpose of using the drying rock was to affect the outer limit of the territorial sea and not to create new areas of internal waters." Ibid., p. 396.

Article 12, which sets forth the rules for drawing the median line in the territorial sea, must be interpreted in this context. This article, read together with Article 11(1), states that the median line *in the territorial sea* may be measured from those low tide elevations which are located within the territorial sea of the coastal State as measured from the actual coastline. *This is because low tide elevations so situated are deemed to possess their own territorial sea*, and cause an outward bulge in the coastal State's territorial sea. Therefore, in drawing a median line in territorial waters between opposite States, when there

exist low tide elevations within the breadth of the territorial sea as measured from one coast, the line must be drawn so as to take into account the territorial sea possessed by these elevations, and the consequent extension of the coastal State's territorial sea. In short, the median line divides the territorial sea of the low tide elevation and that of the opposite coast. See Francois, Addendum to Second Report. . . . , *supra*, at page 8.

The same does not apply in internal waters, such as the river. Low tide elevations do not possess their own internal waters; and it has been shown that they cannot extend internal waters. There is no zone of internal waters appertaining to low tide elevations, and no bulge in the coastal State's internal waters, which must be taken into account in drawing the median line. In fact, to measure the median line from such elevations in internal waters implies that they do extend internal waters, which is contrary to the Territorial Sea Convention.

Viewed in another sense, in a case of opposing coasts, since Article 6 of the Continental Shelf Convention and Article 12 of the Territorial Sea Convention do not allow claims beyond the mid-point as measured from the respective mainland baselines, *i.e.*, from the edge of internal waters, the bulging allowance is without effect in cases where the "shelves" or "seas" touch. See also *US* v. *Louisiana*, 394 U.S. 11 at 47.

(b) Evidence of Application of the Rule Disregarding Low Tide Elevations in International Law

(1) *Decisions of U.S. Courts.* While American courts have not as yet passed on the question specifically posed by this situation, the Supreme Court has come close to doing so on several occasions. In the case of *US* v. *California*, Supplemental Decree, 382 US 448 (1965), the Court construed the Submerged Lands Act, 43 USC §1301 *et seq.*, and held that the term "coast line" included the line of mean low water on islands and low-tide elevations as well as the mainland. 382 US 448, 449 (1965). This was, however, with regard to the situation in which the coastline in question was of a normal configuration and there was no issue of states with opposing coastlines. To underscore the point that this was not a universal rule, the Court went on to note that "[r]oadsteads, waters between islands, and waters between islands and the mainland are not

per se inland waters." *Id.* at 451. In other words, in some situations the baselines referred to in Article 6 on the Continental Shelf Convention and Articles 3 and 12 of the Territorial Sea Convention would not be marked on islands or low-tide elevations off the coast. The easiest such instance to note would be that case in which a low-tide elevation outside the mainland-measured territorial sea would not have effect in possible expansion of the sea width; *another instance is the case of opposing coastlines.*

A second relevant case is *Texas* v. *Louisiana*, 410 US 701 (1972) wherein the Court in effect separated the issue of the "halving" of the river from that of the ownership of the islands in it. To accomplish this it would be necessary to measure the median line from the shores and not from the islands in the river. See 410 U.S. at 712. See also the earlier discussion of this case in part I (d) above.

(2) *International Court of Justice.* The ICJ has had occasion to consider the question, this coming in the *North Sea Continental Shelf Cases.* ICJ Reports (1969) at 3. In discussing the use of median lines for opposing coastlines, the ICJ stated that "[t]he continental shelf area off, and dividing opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delineated by means of a median line; and, *ignoring the presence of islets, rocks and minor coastal projections*, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved." *Id.* at 57, para. 36. [Emphasis added.]

(3) *International Practice*

United Kingdom. The position of the UK at the 1958 Law of the Sea Conference was stated to be thus: On the question of drawing a seabed boundary using equidistance principles, "islands should be treated on their merits, very small islands or sand banks being considered as having no continental shelf but only an appropriate territorial sea. . . . It would seem most inequitable, for instance, if the existence of an island or islet (which by definition need only be a small above-water rock or sandbank, possibly only a few yards long and a few feet high)

should be allowed to divert a boundary and thus give extensive areas of shelf to the State possessing the island. Should such an island exist about halfway between opposite States, both on the same continental shelf, and its base lines be allowed to be used in forming the median line, this line would be switched from the middle of the area separating the States to three quarters of the way across, towards one side or the other, dependent upon the sovereignty of the islet. This of course is an extreme case, but any island near a boundary may have a similar but lesser effect. It might seem reasonable under such circumstances not to permit these islands to have any influence on a boundary but to allow them only their own belts of territorial sea for the purposes of exploration and exploitation." R. H. Kennedy, *Brief Remarks on Median Lines and Lines of Equidistance and on the Methods Used in Their Construction* , April 2, 1958, UN Doc. A/Conf. 13/C.4/SR, 32 at 2, 7-8.

Treaties and Agreements. In addition to these statements which encapsulate the views of many States, there are a number of treaties and boundary settlements which either tend to ignore the presence of rocks and islets or to trade them off, *i.e.*, to disregard them in establishing the baseline for a boundary line. Among them are: *Indonesia/Malaysia*, Department of State, Boundary Studies, Limits in the Seas, LIS 1 (1/22/70); *Norway/Sweden*, LIS 2 (1/22/70); *Bahrain/Saudi Arabia*, LIS 12 3/10/70); *Norway/USSR*, LIS 17 (5/27/70); *Iran/Qatar*, LIS 25 (7/9/70); *Denmark/Sweden*, LIS 26 (7/16/70); *Italy/Yugoslavia*, LIS 9 (2/20/70); *Iran/Saudi Arabia*, LIS 24 (not dated); *Abu Dhabi/Qatar*, LIS 18 (5/29/70).

Austro-Polish Boundary Treaty of 9 February 1776 (Martens, R² II, 124), Article I; *Treaty of San Ildefonso* (Spain/Portugal) of 1 October 1777 (*id*., R², II, 545), Article 14; *Franco-Austrian Peace Treaty of Vienna*, 14 October 1809 (*id*., N.R. I, 210), Article 11; *Peace Treaty of Paris* of 30 May 1814 (*id*., N. R., II, 1), Article III *sub* 5; *Russo-Turkish Treaty of Adrianople* of 14 September 1829 (*id*., N.R., VIII, 152), para. 3; Article 2(2) of *Protocol No. 33* of the European Commission for the Delimitation of Bulgaria of 20 September 1879 (*id*., N.R.G.², V, 680 *et seq*., *sub* 1, at p. 682; *Franco-Siamese Treaty* of 3 October 1893 (*id*., N.R.G.², XX, 172-752); Article 4

of the *Treaty between the Argentine and Brazil* of 6 October 1898 (*id*., N.R.G.², XXXII, 397); Article 6 of the *Agreement between the Union of South Africa and Portugal* of 22 June 1926 (*id*., N.R.G.³, XXIII, 299).

Commentators. While many writers have covered the question of where the equidistant line is to be drawn from, few have explicitly addressed the issue of the complications caused by islands and rocks. We must therefore attempt to infer their intent; in doing so we see that by the use of terms such as "shores" or "edge," they have thought that the question of islands, etc., was not of a critical nature. For example, Bouchez writes that "[t]he median line involves every point on the line being equidistant from the nearest point or points on *opposite shores of the lake, river or strait*." Bouchez, The Fixing of Boundaries in International Boundary Rivers, 12 *Intl. & Comp. L.Q.* 789, 792 (1963). [Emphasis added.]

Verzijl notes that "[t]reaty relations dealing with the State frontier in the case of the existence of islands in a boundary river are legion and many of them date of a much earlier period.

"In the majority of cases it was the median line or is at present the thalweg of the river, which is decisive for the appurtenance of islands to one or the other of the riparian States. This was admitted as far as the thalweg was concerned at an early stage. It is more rare that, inversely, the exact *trace* of the water frontier is dependent upon the existence or the location of islands to the effect that the thalweg boundary is locally abandoned in places where the presence of islands is of primary importance." Verzijl, *International Law in Historic Perspective*, Vol. III (1970) at 569.

In a similar vein, Glos tends to separate the issue of isles from that of median line determination: "With respect to isles, whether existing or newly arising, all isles or their parts situated between the river bank and the median line, if median line division is adopted, and all isles situated between the mid-channel line and a river bank, if the mid-channel line is taken, belong to that particular river bank." Glos, *International Rivers: A Policy-Oriented Perspective* (Singapore 1961) at 237.

According to Ely, "[w]here an islet lies on the same side of a median line (drawn in disregard of that islet), as does the

mainland of the nation owning it, of course no question arises as to the area of the continental shelf which appertains to that islet. This area, whatever it may be, is included within the larger area which is encompassed by the median line between opposite coasts of mainlands or large islands." Ely, Seabed Boundaries Between Coastal States: The Effect Given to Islets as "Special Circumstances," 2 *Intl. Lawyer* 219 (1972) at 232, n. 13.

III.

EQUITABLE CONSIDERATIONS AND "SPECIAL CIRCUMSTANCES."

Another cogent reason for the elimination of small islets and rocks from the determination of the median line baseline is the concept of equitable apportionment of seabed resources. When it is realized that the right of each state to utilize the river and the harbor for common navigation is inalienable and protected by the Federal navigational servitude, it becomes clear that what is sought is a fair and equal distribution of the living resources of the bed, *i.e.*, lobsters and shellfish. See *Texas* v. *Louisiana*, 410 US 701 (1972) wherein it is stated that "[i]t is plain that within the United States two States bordering on a navigable river would have equal access to it for the purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg." *Id.* at 710. See also *Report* of Special Matter at 43, n. 85.

To hold that the dividing line between the States is located in the spot chosen by the Special Master would be to grant a disproportionate share of the fishery to the State of Maine, based on the fact that it is bordered by a group of drying rocks, whereas New Hampshire is not.

"The function of a river—the manner in which a river is used—should be the determining factor in deciding which type of boundary will be applied *in concerto*." Bouchez, The Fixing of Boundaries in International Boundary Rivers, 12 *Intl. & Comp. L.Q.* 789 (1963) at 797. "[I]f, for example, fishing is also important, then it is perhaps more equitable to apply the me-

dian line, provided that it is stiuplated explicitly that there is free navigation in the whole river for ships belonging to both nations." *Id.* at 798.

"Such a system of delimitation has been practiced in, for instance, the Passammaquoddy [sic] Bay. In pursuance of such regulations freedom of navigation is guaranteed while each nation controls a fishing area of equal size. In all other cases—in all situations in which navigation is not a relevant factor—the median line, in general is to be preferred. Even when the interests are dissimilar the median line is the best solution. The main argument supporting the latter statement is that both States under such a solution are entitled to claim equal amounts of the water of the river." *Id.*

In a restricted area such as Portsmouth Harbor, it is inequitable to give effect indiscriminately to small outcroppings or low tide elevations, in calculating the median line.

"Generally, these islands will be small and uninhabited, falling in the rock and islet categories previously defined. Many of these troublesome 'dots' of real estate are found within 12 miles of the equidistant line constructed without their use as basepoints. They have the effect of displacing (assuming a position near mid-point on an opposite situation) the boundary approximately a quarter of the width of the body of water; they may continue to influence a displacement along the water body's length for a maximum distance equal to the width of the body. The inequity would be obvious." * * *

"Thus the ignoring of small islands may involve a desire for simplification of alignment or a perception of equity. In either instance, developing state practice acknowledges a case for the elimination of certain insular basepoints." Department of State, Bureau of Intelligence and Research, *Islands: Normal and Special Circumstances*, RGES-3 (1970) at 58-60.

New Hampshire does concede that Wood Island in Portsmouth Harbor meets the tests of association with the Maine coast sufficiently to be counted as part of the mainland. It qualifies under the parallel lines test of Boggs, *supra* at 257, 258. Further, Chart No. 211 shows that Wood Island is separated from the mainland by only a two foot deep strip of bed upon which piles are built. If Wood Island is used as a point of reference in calculating the median line (to the exclusion of the

low tide elevation at Whaleback Reef) a more equitable division of the disputed area results.

Furthermore this sort of a case, wherein the boundary maker ought to take into account considerations which lie outside the realm of black-letter law, has received international recognition in the form of the "special circumstances" rule found in Article 6 of the Shelf Convention and Article 12 of the Territorial Sea Convention.

The importance of islands affecting a median line was noted by both the Netherlands and Denmark in the *North Sea Continental Shelf Cases*, ICJ Reports (1969), when the ICJ acknowledged their claim of "special circumstances" in the case of islets, commenting that "only the presence of some special feature, minor in itself—such as an islet or small protuberance—but so placed as to produce a disproportionately distorting effect on an otherwise acceptable boundary line would, so it was claimed, possess this character." *Id*. at 20, para. 13.

The Court later laid out several criteria which should be given weight in determining the equidistant line and in considering special circumstances with regard to islands:

> (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
> (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
> (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring between the extent of the continental shelf areas appertaining to the coastal State and the length of the coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

Id. para 101 D.

IV.

CRITIQUE OF THE SPECIAL MASTER'S REPORT

The determination of the Special Master that the midline of the river, rather than the thalweg, is the proper boundary is accepted. Likewise, his statement that "[t]he theoretical answer [to the question of location of the point of intersection] is that the middle or median line following the meandering of the river and everywhere equidistant from the nearest points on opposite sides using the actual water edges at the mean low water line" is correct. In a single footnote (note 84 at 42 and 43) the Special Master failed, however, to set the stage for his final pronouncement, for the following reasons:

(a) The reference made to Boggs, *International Boundaries: A Study of Boundary Functions and Problems* (1940), at 179-184, "for an explanation of the principles used in drawing such a line equidistant from the nearest points of either State along the river, including low-tide elevations" was a misinterpretation. In point of fact, the text on the pages he notes not only does not support his theory of using low-tide elevations, but never even mentions that term or the related "drying rocks"; the closest Boggs comes to the topic is to mention briefly that lake boundaries can be measured to the "shoal water on each shore." Boggs at 180 (citing the International Waterways Commission). Boggs' recurring reference to the shores of lakes would lead one to believe that it was the mainland he was discussing, a thesis given support by his proposed method of determining sovereignty over disputed islands, viz: to first draw the median line from the mainland shores and then equitably apportion the islands. Similarly, the citation to Shalowitz is not in point.

(b) The issue of whether or not the Decree of 1740 does in fact state a "preference for using the low water line" is not material; the universal rule regarding the use of low-tide lines controls and is not inconsistent with the language of the Decree, properly understood.*

(c) The Special Master relies on Article II of the Convention

* "Black Rocks" are shown on the Mitchell Plan, Appendix C to Special Master's Report, and are close to the northerly bank of the Merrimack River in the harbor at Newburyport. In this context, they were used as a natural monument for measuring distance overland, not as a point of reference for a median line.

on the Territorial Sea and Contiguous Zone, 15 UST 1607, TIAS 5639 which he says "urges the use of the low-water line and low-tide elevations to establish the baseline for measuring the breadth of the territorial sea." This is not a proper interpretation of Article 11, as pointed out earlier in this brief.

The Convention does not "urge" the use of low-tide elevations as baselines but rather allows for it, the language employed being: "the low-water line on that elevation *may* be used as the baseline." Art. 11 [Emphasis added.] When compared with other provisions in the Convention which employ the word "shall," for example, Article 13 dealing with baselines on river mouths, the lack of urgency becomes readily apparent.

In sum, Article 11 does not urge the use of low-tide elevations and neither does it apply to situations of opposing coastlines, the latter calling into play special rules which were covered previously.

(b) *Reference to United States* v. *Louisiana*. The next point made by Special Master was that the Supreme Court "has indicated that for purposes of drawing baselines under the Convention's rationale there is 'no distinction' between low-tide elevations and islands, "so citing *U.S.* v. *Louisiana*, 394 US 11, 60, n. 80 (1969), and the reaffirmation found at 420 US 529 (1975). Here the Special Master's interpretation is plainly incorrect. At issue in the Court's statement was "whether a headland of an indentation [a bay in that case] can be located on an island." 394 US 11 at 60. The dictum contained in note 80 stated that "*in this context* there can be no distinction between them." *Id*. [Emphasis added.] In the regime established by the Convention there is a marked distinction between rivers and indentations (*i.e.*, bays); likewise the regimes of opposing coastlines and bay closures are dissimilar. Inasmuch as these are the contexts within which the instant case falls, one must look to Articles 13 (Rivers), and 12 (Equidistance) of the Convention; the rules of construction developed by the Supreme Court for Article 7 on bays are not applicable and the dictum of note 80 cannot be applied.

(e) *Precedents*. The Special Master undertook to cite three instances of international practice to support the argument for inclusion of islands in midline determination. Not only are these three agreements less than satisfactory when compared with those cited in this brief, above, but are also weak when

standing alone. Taking, as an example, No. 60 (Indonesia/Singapore): The reference here is to three of the six points chosen by the parties to delineate the territorial sea between them. Although the text, at 3, states that low-tide elevations were the measuring points for the equidistant line, it is submitted that this characterization was incorrect, with low-tide *line* the intended term. The thesis is borne out by several factors:

1. In the explanation of the locating process, the reference points are stated as named locations and the accompanying map shows them variously as islets or mainland shores.

2. In the summary section, at 5, it is noted that: "*Islands* were utilized as basepoints for the construction of the territorial sea boundary." [Emphasis added.] It makes no reference to low-tide elevations.

The Special Master was wrong to rely on this agreement to support the low-tide elevation theory. The islands utilized there were in effect assimilated to the main shore because of their integral relationship thereto, having met the straight baseline tests.

When these three agreements are compared to the precedents found in the international agreements listed above, it becomes clear that practice in general opposes the rule advanced by the Special Master.

(f) At the conclusion of his footnote, the Special Master states that "[t]he significant points in the Piscataqua Harbor are those low-tide elevations and low-water lines on either side of the harbor that are nearest to each other: the low-water line at Odiornes Point and rocks that expose at low tide off Jaffrey Point and in Whaleback Reef." We submit that this determination was based on unsupported premises and should not be accepted. Instead, the methods of median line-determination outlined in this brief, above, should be employed in delineating the New Hampshire-Maine boundary line at the point where it crosses the closing line of Portsmouth Harbor.

V.

CORRECT EQUIDISTANT POINT

Consistent with the rules of construction advocated in this

brief by New Hampshire, the point at which the median line of the River and Harbor ought to intersect the closing line of the Harbor is at the point on the closing line which is an equal distance from the nearest points on the shore (measured at the low-water line or a triangular extention thereof) of each state.

The New Hampshire locus is the low-water line at the northerly apex of Jaffrey Point and the Maine locus is the low-water line at the southern edge of Wood Island. The point on the harbor's closing line equidistant from these two loci has the geographic position of 43° 3' 9" North and 70° 42" 00" West, or approximately 350 yards northeasterly of the point selected by the Special Master. It is to this point that the River median line extends and from it that the straight line to Gosport Harbor runs.

VI.

CONCLUSION

For the reasons stated above, the exceptions of New Hampshire should be sustained. The decree recommended by the Special Master should be modified so as to locate the point at which the median line between the banks of the Piscataqua River intersects the closing line of Portsmouth Harbor at the geographic position of 43° 3' 9" North and 70° 42' 00" West, or approximately 350 yards northeasterly of the position selected by the Special Master. This position should be the northwesterly terminus of a state boundary proceeding in a straight line in a southeasterly direction to the position which is the geographic middle of the entrance to Gosport Harbor in the Isles of Shoals. In all other respects the report of the Special Master should be confirmed and its recommendations incorporated in the final decree, particular reference being made to the recommendation of provisions for marking the boundary (Report p. 59, note 116).

Respectfully submitted
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Counsel for the Plaintiff

APPENDIX A

TERRITORIAL SEA CONVENTION (15 UST 1607, TIAS 5639)

Art 3 Baselines. Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Art 10 Islands. 1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide. 2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Art 11 Low-tide Elevations. 1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

Art 12 Equidistance. 1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision. 2. The line of delimitation between the territorial seas of two States lying opposite to each other shall be marked on large-scale charts officially recognized by the coastal States.

Art 13 Rivers. If a river flows directly into the sea, the

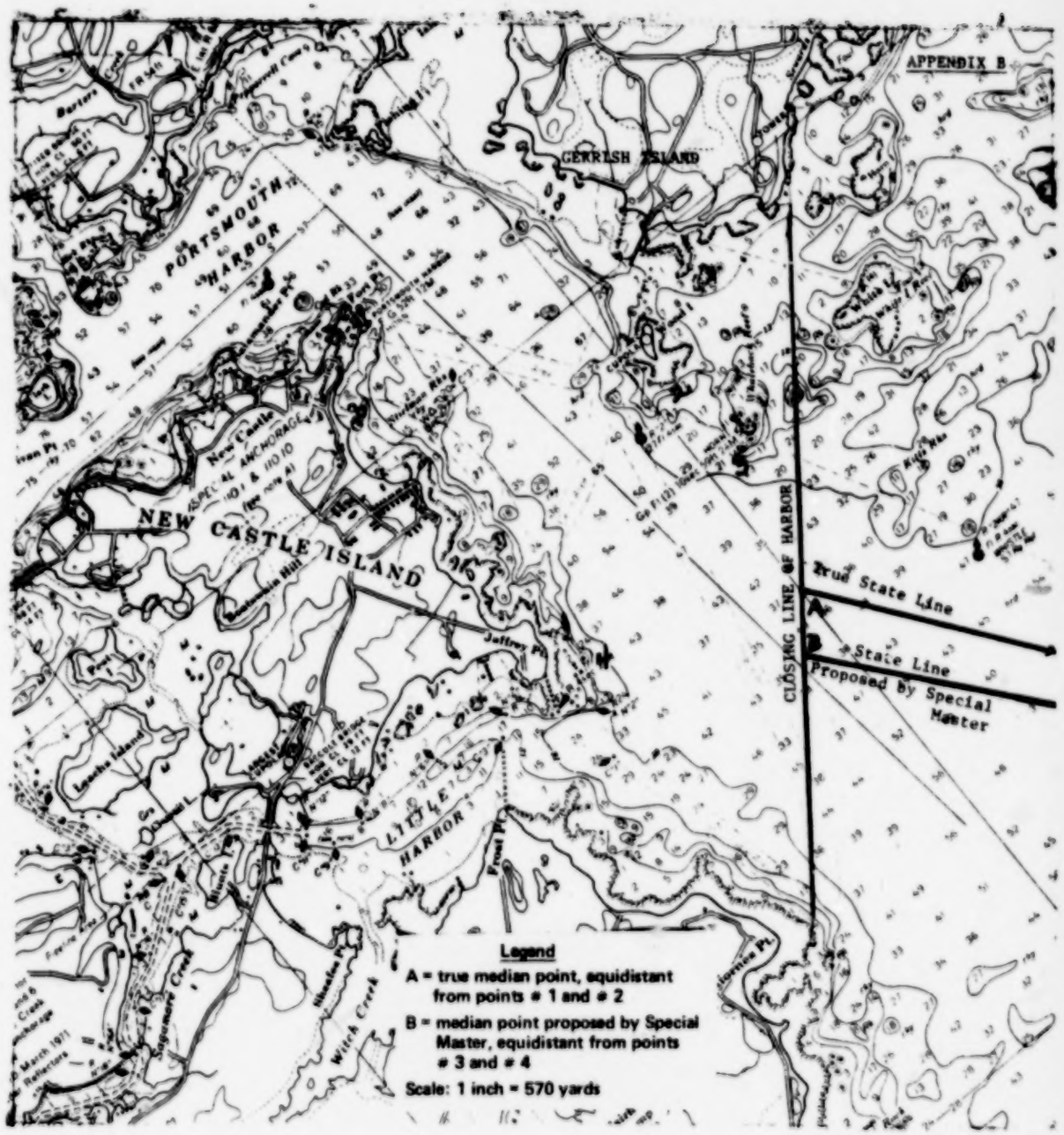
baseline shall be a straight line across the mouth of the river between the points on the low-tide line of its banks.

CONTINENTAL SHELF CONVENTION (15 UST 471, TIAS 5578)

Art 6 Adjacent Shelf. 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

. . . .

APPENDIX B


PORTSMOUTH HARBOR
GERRISH ISLAND
NEW CASTLE ISLAND
LITTLE HARBOR
CLOSING LINE OF HARBOR
True State Line
State Line Proposed by Special Master
Legend
A = true median point, equidistant from points # 1 and # 2
B = median point proposed by Special Master, equidistant from points # 3 and # 4
Scale: 1 inch = 570 yards

Supreme Court, U. S.
FILED
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No. 64, Original

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE STATE OF NEW HAMPSHIRE, Plaintiff

v.

THE STATE OF MAINE, Defendant

EXCEPTIONS OF THE STATE OF MAINE TO THE REPORT OF THE SPECIAL MASTER FILED OCTOBER 4, 1975, AND BRIEF IN SUPPORT OF EXCEPTIONS

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STATEMENT OF THE CASE

The lateral ocean boundary between the State of Maine and the State of New Hampshire has been in dispute for many years. In 1971 an effort to settle the boundary dispute by interstate compact was begun. At that time a boundary commission containing representatives appointed by each state was established to agree upon a boundary for approval of their respective legislatures and ultimately for submission to the United States Congress for acceptance as an interstate compact. After extended negotiations the commission was unable to agree upon an acceptable line.

In 1973 a series of enforcement incidents occurred which brought the states to the brink of physical confrontation in what has been characterized as the "lobster war." At this point boundary negotiations were abandoned and the State of New Hampshire petitioned for Leave to File a Complaint to fix the lateral marine boundary of New Hampshire and Maine in the Atlantic Ocean between Portsmouth Harbor and Gosport Harbor. On October 9, 1973, the motion was granted, 414 U.S. 810, and the case was referred to a Special Master on November 5, 1973, 414 U.S. 996.[1]

At the outset of the proceedings before the Special Master the divergence of the boundary contentions of each state created a disputed area of several thousand acres of land. In preparation for trial both states submitted pretrial memoranda and undertook to develop the relevant facts.

During a pretrial conference in April of 1974 the Special Master urged the states to resolve their boundary dispute without further extensive development of the evidence. Pursuant to the Special Master's request, counsel for the states met to consider the principles of law and findings of fact which could provide a basis for a boundary which could be submitted in a consent decree. As a result of their deliberations, the parties prepared and presented a Motion For Entry of Judgment, Motion to Amend Motion For Entry of Judgment by Consent and a Proposed Draft of a Final Decree to the Special Master. (App., pp. 14, 20, 24) During this time the States of Maine and New Hampshire were engaged with the United States in another case of original jurisdiction, *United States v. Maine*, 420 U.S. 515 (1975) which presented some common

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1 Subsequent to the time this case was referred to a Special Master, the boundary commission met to discuss a possible political settlement. When continued efforts to negotiate a boundary proved fruitless, the attempt was totally abandoned.

issues. For that reason the United States was provided notice of the consent decree and permitted to participate in its formulation. The United States reviewed the Motion for Entry of Judgment by Consent as amended and indicated that it had no objection to its entry. (App., p. 29)

On October 4, 1975, the Special Master issued his report rejecting the consent decree and submitting his determination of the location of the lateral ocean boundary for approval of the Court.

EXCEPTIONS

The State of Maine excepts to the following findings and conclusions in the Master's Report:

1. The consent decree should be rejected. (Report, pp. 3-4)

2. Thalweg should not be used to determine the "mouth of the harbor," "middle of the river" and "middle of the harbor." (Report, p. 41)

SUMMARY OF ARGUMENT

The Court's authority under Article III of the Constitution permits entry of consent decrees achieved in cases of original jurisdiction. That authority is limited only when the consent decree does not achieve a permanent resolution of the dispute by application of legal principles to the relevant facts of the case. The Court has the authority to enter the consent decree submitted by the States of Maine and New Hampshire in this case because it is a final, binding resolution of the boundary dispute between the parties which was obtained after application of appropriate legal principles to the facts which the parties had developed prior to submission of the decree. Moreover, if the court finds that the form of the consent decree is defective, the proper remedy is not outright rejection of the decree. The Court should permit the parties the opportunity to correct the form by referring the decree back to the Special Master.

In any event, the boundary line in the proposed decree should be accepted by the Court because it results from the application of the only principles appropriate to the interpretation of the decree issued by the King of England in 1740.

ARGUMENT

I. THE SPECIAL MASTER ERRONEOUSLY REJECTED THE PROPOSED CONSENT DECREE.

A. This Court Has Authority to Enter The Consent Decree.

Although the Master rejected the decree, he decided that the decree should be submitted for the Court's consideration (Report p. 3) and accepted, if his reasons for rejecting it were erroneous. (Report p. 4)

The Special Master's rejection of the decree is based on the decision of this Court in *Ver nt v. New York*, 417 U.S. 270 (1974), which rejected a decree that constituted "mere settlements by the parties acting under compulsions and motives that have no relation to performance of [the Court's] Article III functions." (Report p. 3) The Master has interpreted the *Vermont* decision as authority for his view that Article III does not authorize the Supreme Court to accept consent decrees in cases it has accepted under its original jurisdiction. In the Master's view, any settlement of the parties would circumvent the procedures for establishing interstate compacts pursuant to Article I § 10 of the Constitution (Report p. 3). The effect of the Special Master's decision is that litigation to judgment is the only alternative to agreement through interstate compact.

Nothing in the Court's opinion in *Vermont v. New York* denies the authority of the Court to enter consent decrees in cases of original jurisdiction. In that case the Court rejected a consent decree which required appointment of a Special Master to continue to police the situation which had given rise to the dispute. The Court rejected the arrangement because it required a court to act in an arbitral rather than a judicial manner. at 277. The Court also objected to the decree in the *Vermont* case because the Special Master's decision was not an exercise of judicial power under Article III, which it described as "the application of principles of law or equity to facts distilled by hearings or by stipulations." at 277. If it had intended to deny its authority to enter consent decrees, the Court would have done so directly without the lengthy explanation of what constitutes a proper exercise of its Article III functions.

Because it did not deny its authority to enter consent decrees, the only implication which can be drawn is that it never questioned that authority.

Although precedent for the exercise of this Court's authority to enter consent decrees in original acti ns is not extensive, the Court has indicated it has this authority by its actions in prior cases of original jurisdiction.

The original papers on file with this Court in *Wisconsin v. Illinois*, 388 U.S. 426 (1967), October term 1966, Nos. 1, 2, 3, and 11 Orig., indicate that all the parties, including the United States, filed a Joint Motion and Proposed Decree four months after the Master had filed his report. The Joint Motion disagreed with certain aspects of the Master's legal conclusions and reserved certain legal issues he had decided for future proceedings. The motion also contained assurances that the parties would not raise the open legal questions absent a substantial change in circumstances. This Court entered the decree accepting the Master's findings of fact but not his legal conclusions. The court notes that the Master's legal conclusions need not be considered since the parties had agreed on the form of decree. Thus in *Wisconsin* this Court, without questioning its authority to do so, entered a consent decree which the parties proposed to avoid adjudication of certain legal issues decided by the Special Master.

In *Arizona v. California*, 373 U.S. 546 (1963) the Court indicated its preference that states settle their controversies by agreement, but recognized that this Court does have a serious responsibility to adjudicate cases where there are actual existing controversies. at p. 564. In the course of its adjudication of the legal rights of the parties to use the waters of the Colorado River, the Court addressed a compromise agreement regarding the use of the waters of the Gila River which had been submitted to the Special Master by Arizona and New Mexico. Noting that the Master had incorporated the compromise in his findings and conclusions, and that the parties had not taken exceptions to his Report, the Court accepted the decree. at 394-395. See also *United States v. Swift & Co.*, 286 U.S. 106, 114, 115 (1932).

Since the Master's decision is not supported by *Vermont v. New York* and is directly contradicted by the actions of this Court in other cases of original jurisdiction, this Court should find that the Master is in error, and then follow the Master's recommendation by accepting the decree.

B. The Application of Vermont v. New York Does Not Require Rejection of the Proposed Consent Decree.

In *Vermont v. New York*, 417 U.S. 270 (1974) this Court rejected a consent decree because it was not a final, binding determination of the underlying legal dispute between the parties, but rather an accommodation which required the Court to act "more in an arbitral than a judicial manner." at p. 277. In addition, the Court objected to the *Vermont* decree because it was reached in a manner outside the judicial power of Article III which requires "application of principles of law or equity to facts distilled by hearings or by stipulations." at p. 278. Neither of the objections which led to the rejection of the *Vermont* decree apply to the decree submitted by Maine and New Hampshire in this case.

The decree in this case is a binding determination which was submitted to achieve a conclusive termination of the long and often disruptive boundary dispute between the two states. In no way does entry of this decree require the Court to act as arbiter of present or future boundary rights in the disputed area. For this reason alone the rule announced in *Vermont v. New York* does not require rejection of the decree submitted by Maine and New Hampshire.

The *Vermont* rule does not apply to this consent decree for the additional reason that it was based entirely upon the application of principles of law and equity to the facts developed by the parties. In conference with the Special Master and consultation with the United States Government, the States of Maine and New Hampshire chose and applied the legal principles which were most appropriate for the interpretation of the 1740 decree which established the location of their lateral boundary. On the basis of the decisions of this Court, the opinions of international lawyers and evidence of the understanding of the concept in 1740 when the decree was issued, the States decided that the doctrine of thalweg was the only principle which could be applied to determine "the middle of the river," "mouth of the harbor," and "middle of the harbor" as described in the King's decree. Moreover, the States determined that the "special circumstances" rule dictated a straight line to constitute the boundary between Portsmouth and Gosport Harbors. Finally the States determined that the end points of the straight line should be the end of the natural channel in the mouth of both harbors. To determine the natural end of the channel Maine and New Hampshire undertook extensive surveys of the bottom. The proposed consent decree was the result of the application of these principles to the facts as they had been developed by the States at the time it was submitted. It is clear from the process undertaken by the parties to determine their lateral ocean boundary that the Master erroneously concluded that the decree constituted "mere settlements by the parties acting under compulsion and motives that have no relation to the performance of the Court's Article III functions." Because the decree submitted by Maine and New Hampshire is a final determination of the boundary which was obtained in the proper performance of judicial powers under Article III, as required by this Court in *Vermont v. New York*, we respectfully request the Court to enter the consent decree as originally submitted.

II. THE OBJECTIONS OF THE SPECIAL MASTER SHOULD BE REMEDIED BY REFERRING THE CONSENT DECREE FOR CLARIFICATION.

The Special Master indicates that he rejected the consent decree because "the moving papers do not propose a case or controversy in which the Court might apply 'principles of law or equity to facts distilled by hearings or stipulations.'" (Report pp. 3-4) We believe, however, that the Master's objection is not one of substance but one of form. If this Court determines there is a deficiency which must be corrected at this time, the proper solution is to refer the decree back to the Master to permit the parties to specify the conclusions of law and findings of fact which establish the line they proposed. Public policy does not require the Court to do more.

In this case the parties entered into an original action to decide a long and often angry dispute over the location of their lateral boundary. To that end the parties committed substantial legal and financial resources in cooperation with the Special Master and the United States Government to reach a decision regarding the legal principles and facts required to determine the boundary. The Court should decide this case in a way which encourages such initiative by parties in future cases of original jurisdiction. If the Court adopts this Master's Report, it will deny the States the option to terminate any case of original jurisdiction short of a full trial of the issues. By

foreclosing the States' option to enter consent decrees the Court will require the unnecessary expenditure of time and money in many cases. When the public interest is so directly involved, this Court should not require such results.

III. THE MOST APPROPRIATE LATERAL BOUNDARY IS THE LINE PROPOSED IN THE JOINT CONSENT DECREE.

The State of Maine agrees with the Special Master's decision that the decree issued by the King of England established the boundary between Maine and New Hampshire in the disputed area. (Report, p. 32) Moreover, the State of Maine does not object to the Special Master's decision to divide the line into the following elements:

1. What is meant by the mouth of the Piscataqua Harbor?
2. What is meant by the middle of the river?
3. Where does the line parting the Isles of Shoals begin to run through the middle of the harbor?
4. How shall "the dividing line" proceed between the mouth of the Piscataqua and the Isles of Shoals? (Report p. 32)

The State also agrees with the Master's decision to run a straight line as the portion of the boundary line connecting the mouth of Piscataqua Harbor and the mouth of Gosport Harbor. However, the State does object to the method used by the Special Master to determine the end points of the straight line portion of the boundary. Our position is that thalweg is the only principle which can be used to determine where "mouth of the harbor" meets the "middle of the river" in Piscataqua Harbor and the location of the "middle of the harbor" in Gosport Harbor. The principles used by the Special Master to determine the end points of the line are unsupported by authority and lead to an interpretation which the drafters of the 1740 decree could not have intended.

A. The End Points of the Straight Line Portion of the Lateral Boundary Must be the End Point of the Natural Channel in the Mouth of Both Harbors.

1. The Principles the Master Uses to Determine the Harbor Mouth Must be Rejected.

The 1740 decree provides that the dividing line "shall pass through the mouth of the Piscataqua Harbor and up the mid-

dle of the river" and shall part the Isles of Shoals and run through the middle of the Harbor." There is complete agreement that the dividing line should be drawn from the middle point in each harbor mouth. To locate that point the Special Master has chosen to apply the principle of "geographic middle" to determine the location of the middle of the river described in the decree of 1740. As the next step in his analysis the Special Master concluded that the only meaning of the mouth of the Piscataqua Harbor is "the opening between the seawardmost points of land at which the shore 'turns' as the Piscataqua River flows into the ocean." (Report p. 34) As the final step in his analysis the Special Master located the end points of the straight line portion of the dividing line by fixing the intersection of the "geographic middle" and the closing line drawn across the narbor mouth. (Report pp. 41-44)

The principles utilized by the Special Master cannot be accepted as appropriate to interpret the language of the decree because they create the real danger of a segmented dividing line. This result cannot be permitted because the 1740 decree clearly describes a continuous dividing line.

In the geographic circumstances of this case a reasonable result of the application of the Special Master's principle is that the harbor mouth is located seaward of the river's middle point. Thus, where the land "turns seaward" is a subjective principle which could result in the determination of a harbor mouth located seaward of the termination of the river. Clearly no intersection of the line in the middle of the river with the closing line depicting the harbor mouth could occur if the headlands "turned" at a point seaward of the termination of the river. While it is not disputed that the line determined by the Special Master is continuous, it is clear that a continuous dividing line is not the necessary result of the application of the principles he chose. Absent clear authority in support of the principles applied by the Special Master, they must be rejected.

2. The natural end of the Channel Must Establish the Location of the Harbor Mouth.

a. Thalweg is the only principle which guarantees the continuity of the dividing line.

The 1740 decree provided that the dividing line shall pass up the mouth of Piscataqua Harbor and up the middle of the

River. This line can be continuous only if the river joins the mouth of Piscataqua Harbor. The doctrine of thalweg is the only principle appropriate to interpret the decree because it guarantees that the dividing line will be continuous. Thus locating the harbor mouth at the point where the river channel merges with the ocean guarantees the continuity of the boundary described in the 1740 decree. After extensive surveys undertaken in cooperation with the State of New Hampshire, the State of Maine has determined that the river bottom merges with the ocean bottom at a point intersected by a line drawn from Odiornes Point to Kitts Rocks. For identical reasons the end point of the straight line section must be located at the point where the harbor channel merges with the ocean bottom of Gosport Harbor. These points are the end points of the straight line portion of the boundary in the consent decree submitted by Maine and New Hampshire (App. p. 24).

b. Thalweg is the only principle which is Legally Supportable for Determining the Location of the Harbor Mouth.

The Special Master located the harbor mouth where the headlands "turned" in Portsmouth Harbor and where "shelter" ended in Gosport Harbor. (Report pp. 34, 44) No legal authority was cited by the Special Master for the application of these tests. Thalweg on the other hand is a principle of international law which has gained wide acceptance in determination of State water boundary disputes. *Louisiana v. Mississippi*, 202 U.S. 1, 50 (1906); *Arkansas v. Mississippi*, 250 U.S. 39, 43, 44 (1919); *New Jersey v. Delaware*, 291 U.S. 361, 378-80 (1934). The Special Master rejects thalweg because the line between Maine and New Hampshire "derives from a written boundary decree and not from a pure application of international law principles." (Report p. 41) The decisions of this Court demonstrate that this objection to the application of thalweg is not valid. In *Arkansas v. Tennessee*, 246 U.S. 158, 170-1 (1918), the court applied thalweg to determine the meaning of middle of the river as it was *written* in the Treaty of Peace entered between the United States and Great Britain in 1783. See also *Iowa v. Illinois*, 147 U.S. 1, 10 (1893).

The Master's second objection to thalweg is that it had only germinal existence in 1740. This rejection is contradicted by the practice of the parties before the King's Commission to settle the boundary between the Province of New Hampshire

and Massachusetts Bay.[2] In those proceedings both New Hampshire and Massachusetts applied thalweg doctrine to interpret the language of their royal charters.[3] Moreover, the practice of agencies of United States and New Hampshire establish that the mouth of the harbor is a line which intersects the natural end of the channel. Since 1929 the United States Coast and Geodetic survey has defined the entrance to Portsmouth Harbor as the line joining Odiornes Point and the Kitts Rocks whistle buoy.[4] An identical position was taken by the New Hampshire State Port Authority when it defined the Portsmouth Harbor mouth as a line from Odiornes Point to Flashing Buoy No. 2.[5]

Because the doctrine of thalweg is well supported by the decisions of this Court and is the only principle which guarantees that interpretation of the 1740 decree will result in a continuous dividing line, it should be applied by the Court to determine the "mouth of the harbor" and "middle of the harbor" to which the straight line portion of the boundary is drawn.

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2 "Minutes of the King's Commission to Settle the Boundary Lines between the province of New Hampshire and Massachusetts Bay in New England." Colonial Office America and West Indies original correspondence, Vol. 880, Number 79.

3 Id. at 8-10, 19-22, 24-33, 34-51, 56-70, 73-74, 77-111, 115-122, 132-139, 149.

4 "Tides and Currents in Portsmouth Harbor" special publication No. 150, U.S. Coast and Geodetic Survey, Dept. of Commerce 1929. U.S. Coast Pilot, Atlantic Coast, Eighth Edition, 1971, National Ocean Survey, U.S. Department of Commerce publication, at 199-201.

5 Rules and Regulations Pertaining to Harbors and Tidal Waters of the State of New Hampshire (1971).

CONCLUSION

For the foregoing reasons, this Court should reject the recommendations of the Special Master and enter the decree proposed by the States of Maine and New Hampshire.

Respectfully submitted,

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Dated: December 1975.

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In the
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OCTOBER TERM, 1973

No. 64, Original

THE STATE OF NEW HAMPSHIRE, *Plaintiff*

v.

THE STATE OF MAINE, *Defendant*

MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

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In the
Supreme Court of the United States

October Term, 1973

No. 64, Original

The State of New Hampshire, Plaintiff

v.

The State of Maine, Defendant

MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

Come now the State of New Hampshire and the State of Maine by and through their respective counsel and move the Court to enter judgment in this action by consent of the Plaintiff and Defendant as specified hereunder.

Counsel for Plaintiff, namely, the Attorney General of New Hampshire, Warren B. Rudman, the Deputy Attorney General of New Hampshire, David H. Souter, and Special Counsel for New Hampshire, Richard F. Upton, and Counsel for Defendant, the Attorney General of Maine, Jon A. Lund, and Assistant Attorney General Charles R. Larouche, represent to the Court that after long and careful study, they have come to agreement as to the pertinent facts and the applicable legal principles determinative of this action. The aforementioned Counsel have concluded that it is in the best interest of each State and of the Court to dispose of this action by a judgment as specified hereunder.

The aforementioned Counsel assure the Court that the requested disposition of this action has been fully explained to the Governor and Executive Council of each State by its Counsel and that the Governor and Executive Council of each State approve the requested disposition of this action.

WHEREFORE, the Plaintiff and Defendant, by and through their respective Counsel, move the Court to enter the following judgment, each party hereby consenting thereto:

(1) This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor, upon the Complaint, Answer Pretrial Memoranda and agreement of Counsel for New Hampshire and for Maine.

(2) The source of the lateral marine boundary line between New Hampshire and Maine lies in the Order of the King in Council of April 9, 1740, which Order provided:

> "And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thrô the Mouth of Piscataqua Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments And That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side; and that the Southwesterly part of the said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in, and be accounted part of the Province of the Massachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same. . . ."

(3) The terms "Middle of the River" and "Middle of the Harbour," as used in the above-quoted Order mean the middle of the main channel of navigation of the Piscataqua River and the middle of the main channel of navigation of Gosport Harbor.

(4) The middle of the main channel of navigation of the Piscataqua River, commencing in the vicinity of Fort Point,

New Hampshire and Fishing Island, Maine, proceeding southward, is as indicated by the range lights located in the vicinity of Pepperrell Cove, Kittery Point, Maine, and it follows the range line as marked on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973.

(5) The main channel of navigation of the Piscataqua River terminates at a point whose position is latitude 43° 02′ 42.5″ North and longitude 70° 42′ 06″ West. Said point has a computed bearing of 194° 44′ 47.47″ true and a computed distance of 1,554,45 metres (1,700 yards) from the Whaleback Lighthouse, No. 19, USCG-158, whose position is latitude 43° 03′ 31.213″ North and longitude 70° 41′ 48.515″ West (reference National Geodetic Survey).

(6) The middle of the main channel of navigation of Gosport Harbor passes through a point indicated by the bottom of the BW "IS" Bell Buoy symbol as shown on Coast and Geodetic Survey Chart 211, 8th edition, Dec. 1, 1973. The position of this point is latitude 42° 58′ 51.6″ North and longitude 70° 37′ 17.5″ West as scaled from the above-described chart.

(7) The main channel of navigation of Gosport Harbor terminates at a point whose position is latitude 42° 58′ 55″ North and longitude 70° 37′ 39.5″ West. Said point has a computed bearing of 349° 08′ 52.81″ true and a computed distance of 1,674.39 metres (1,831 yards) from the Isles of Shoals Lighthouse, No. 20, USCG-158, whose position is latitude 42° 58′ 01.710″ North and longitude 70° 37′ 25.590″ West (reference National Geodetic Survey).

(8) The lateral marine boundary line between New Hampshire and Maine connecting the channel termination points described above is the arc of a great circle (appears as a straight line on a Mercator projection) whose computed length is 9,257.89 metres (10,124.53 yards).

(9) The lateral marine boundary line between New Hampshire and Maine from the Piscataqua River channel termination point proceeds toward Gosport Harbor channel termination point on a computed bearing of 139° 20′ 27.22″ true.

(10) The lateral marine boundary line between New Hampshire and Maine from the Gosport Harbor channel termination point proceeds toward Piscataqua River channel

termination point on a computed bearing of 319° 17′ 25.43″ true.

(11) All positions in the preceding paragraphs are referred to the North American Datum of 1927.

(12) The boundary line delimited hereinabove is depicted by a heavy black line with the words "Maine" and "New Hampshire" above and below that line on the Coast and Geodetic Survey Chart 211, Eighth Edition, Dec. 1, 1973, filed herewith.

(13) Provision shall be made for installation and maintenance of suitable markers and/or navigation aids and devices to locate and mark the boundary as settled, subject to any applicable federal regulations, the costs of which shall be shared equally by the two States. The parties hereto shall within 180 days after the entry of this judgment file a stipulation with this Court indicating the points and locations at which such markers and/or navigation aids and devices are to be located and the kinds of markers and/or navigation aids and devices agreed upon. If the parties hereto are unable to agree upon such a stipulation, then upon the expiration of such 180 day period, application shall be made by them, or either of them, to this Court for the appointment of a Commissioner with full power to hear evidence and locate and mark the boundary as settled and make a return of his actions to this Court, the costs of which proceedings shall be shared equally by the two States.

(14) The State of Maine, its officers, agents and representatives, its citizens, and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the territory adjudged to her by this decree; and the State of New Hampshire, its officers, agents and representatives, its citizens, and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the territory adjudged to her by this decree.

(15) The costs of this action shall be equally divided between the two States, and this case is retained on the docket for further orders, in fulfillment of the provisions of this decree.

(16) This motion is made by each State without prejudice to its claims concerning its lateral marine boundary with the other, easterly of the Isles of Shoals.

Dated: September , 1974

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 64, Original

THE STATE OF NEW HAMPSHIRE, Plaintiff

v.

THE STATE OF MAINE, Defendant

MOTION TO AMEND MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

Now come The State of New Hampshire and The State of Maine by and through their respective Counsel and move that the Motion for Entry of Judgment by Consent of Plaintiff and Defendant, heretofore filed in the above-entitled action, be amended as follows:

1. Amend the second unnumbered paragraph of the introduction to the body of the Motion, appearing on page 1 of the Motion, so that the same will read as follows:

"Counsel for Plaintiff, namely, the Attorney General of New Hampshire, Warren B. Rudman, the Deputy Attorney General of New Hampshire, David H. Souter, and Special Counsel for New Hampshire, Richard F. Upton, and Counsel for Defendant, the Attorney General of Maine, Jon A. Lund, and Assistant Attorney General Charles R. Larouche, represent to the Court that after long and careful study of the issues in dispute and the Complaint, the Answer, the Pretrial Memoranda and applicable principles of constitutional and international law, they have come to agreement as to the pertinent facts and the applicable legal principles determinative of this

action. The aforementioned Counsel have concluded that it is in the best interest of each State and of the Court to dispose of this action by a judgment as specified hereunder."

2. Amend paragraph (1) of the Motion by striking out all after the words "Gosport Harbor" so that said paragraph (1) as amended shall read as follows:

"(1) This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor."

3. Amend paragraph (2) of the Motion by striking out the same and inserting in place thereof the following new paragraph:

"(2) The Order of the King in Council of April 9, 1740, in pertinent part, provided:

"And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thrô the Mouth of Piscataqua Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments and That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side; and that the Southwesterly part of the said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in and be accounted part of the Province of the Massachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same. . ."

4. Amend said Motion by renumbering the present paragraphs (8), (9), (10), (11), (12), (13), (14), (15) and (16)

as (9), (10), (11), (12), (13), (14), (15), (16) and (17) and by inserting the following new paragraph (8):

"(8) The lateral marine boundary between New Hampshire and Maine connecting the channel termination points described in paragraphs (5) and (7) above has been determined on the basis of the 'special circumstances' exception to Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (15 U. S. Treaties 1608) and of the location of the Isles of Shoals which were divided between the two states in their colonial grants and charters."

5. Amend paragraph (14) of the Motion (now paragraph (15) as renumbered) by striking out said paragraph and inserting in place thereof the following new paragraph:

"(15) The State of Maine, its officers, agents, representatives, and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the area adjudged to her by this decree; and the State of New Hampshire, its officers, agents, representatives, and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the area adjudged to her by this decree."

Dated this 21st day of October, 1974.

WARREN B. RUDMAN
Attorney General of New Hampshire

DAVID H. SOUTER
Deputy Attorney General of New Hampshire

RICHARD F. UPTON
Special Counsel
Counsel for Plaintiff
The State of New Hampshire

JON A. LUND
Attorney General of Maine

CHARLES R. LAROUCHE
Assistant Attorney General of Maine
Counsel for Defendant
The State of Maine

UPTON, SANDERS & UPTON

10 Centre Street

Concord, N. H. 03301

November 1, 1974

Hon. Tom C. Clark
Supreme Court Justice (Retired)
U. S. Supreme Court Building
Washington, D. C. 20543

Re: No. 64, Original, New Hampshire vs. Maine.

Dear Mr. Justice Clark:

The parties have prepared a proposed draft of a final decree in the event that favorable consideration is given to their motion for entry of judgment by consent of the parties. We enclose twelve copies of the same for your consideration. This draft has been examined and approved by Charles Larouche, Esq., Assistant Attorney General of Maine, as conforming to the motion and the intention of the parties.

Copies of this letter and enclosures have been sent to Mr. Larouche.

Very truly yours,
Richard F. Upton

RFU/mph

Enclosures

cc: Charles Larouche, Esq.

Hon. David Souter

Deputy Attorney General

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 64, Original

THE STATE OF NEW HAMPSHIRE, Plaintiff

vs.

THE STATE OF MAINE, Defendant

JUDGMENT AND DECREE

This cause, having been submitted upon the pleadings, pretrial memoranda, motion for entry of judgment by consent of Plaintiff and Defendant, and upon the Report of the Special Master thereon;

It is now ordered, adjudged and decreed as follows:

1. The Report of the Special Master is hereby approved, and the motion for entry of judgment by consent of Plaintiff and Defendant is granted.

2. This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor in the Isles of Shoals.

3. The Order of the King in Council of April 9, 1740, in pertinent part, provided:

> "And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thrô the Mouth of Piscataqua Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments and That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side; and that the Southwesterly part of said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in, and be accounted part of the Province of the Masachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same. . . ."

4. The terms "Middle of the River" and "Middle of the Harbour," as used in the above-quoted Order, mean the middle of the main channel of navigation of the Piscataqua River and the middle of the main channel of navigation of Gosport Harbor.

5. The middle of the main channel of navigation of the Piscataqua River, commencing in the vicinity of Fort Point, New Hampshire and Fishing Island, Maine, proceeding southward, is as indicated by the range lights located in the vicinity of Pepperrell Cove, Kittery Point, Maine, and it follows the range line as marked on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973.

6. The main channel of navigation of the Piscataqua River terminates at a point whose position is latitude 43° 02′ 42.5″ North and longitude 70° 42′ 06″ West. Said point has a computed bearing of 194° 44′ 47.47″ true and computed distance of 1,554.45 metres (1,700 yards) from the Whaleback Lighthouse, No. 19, USCG-158, whose position is latitude 43° 03′ 31,213″ North and longitude 70° 41′ 48.515″ West (reference National Geodetic Survey).

7. The middle of the main channel of navigation of Gosport Harbor passes through a point indicated by the bottom of the BW "IS" Bell Buoy symbol as shown on Coast and Geodetic Survey Chart 211, 8th edition, Dec. 1, 1973. The position of this point is latitude 42° 58′ 51.6″ North and longitude 70° 37′ 17.5″ West as scaled from the above-described chart.

8. The main channel of navigation of Gosport Harbor terminates at a point whose position is latitude 42° 58′ 55″ North and longitude 70° 37′ 39.5″ West. Said point has a computed bearing of 349° 08′ 52.81″ true and a computed distance of 1,674.39 metres (1,831 yards) from the Isles of Shoals Lighthouse, No. 20, USCG-158, whose position is latitude 42° 58′ 01.710″ North and longitude 70° 37′ 25.590″ West (reference National Geodetic Survey).

9. The lateral marine boundary between New Hampshire and Maine connecting the channel termination points described in paragraphs (6) and (8) above has been determined on the basis of the "special circumstances" exception to Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (15 U. S. Treaties 1608) and of the location of the Isles of Shoals which were divided between the two states in their colonial grants and charters.

10. The lateral marine boundary line between New Hampshire and Maine connecting the channel termination points described above is the arc of a great circle (appears as a straight line on a Mercator projection) whose computed length is 9,257.89 metres (10,124.53 yards).

11. The lateral marine boundary line between New Hampshire and Maine from the Piscataqua River channel termination point proceeds toward Gosport Harbor channel termination point on a computed bearing of 139° 20′ 27.22″ true.

12. The lateral marine boundary line between New Hampshire and Maine from the Gosport Harbor channel termination point proceeds toward Piscataqua River channel termination point on a computed bearing of 319° 17′ 25.43″ true.

13. All positions in the preceding paragraphs are referred to the North American Datum of 1927.

14. The boundary line delimited hereinabove is depicted by a heavy black line with the words "Maine" and "New Hampshire" above and below that line on the Coast and Geodetic Survey Chart 211, Eighth Edition, Dec. 1, 1973, filed with the Motion for Entry of Judgment by Consent.

15. Provision shall be made for installation and maintenance of suitable markers and/or navigation aids and devices to locate and mark the boundary as settled, subject to any

applicable federal regulations, the costs of which shall be shared equally by the two States. The parties hereto shall within 180 days after the entry of this judgment file a stipulation with this Court indicating the points and locations at which such markers and/or navigation aids and devices are to be located and the kinds of markers and/or navigation aids and devices agreed upon. If the parties hereto are unable to agree upon such a stipulation, then upon the expiration of such 180 day period, application shall be made by them, or either of them, to this Court for the appointment of a Commissioner with full power to hear evidence and locate and mark the boundary as settled and make a return of his actions to this Court, the costs of which proceedings shall be shared equally by the two States.

16. The State of Maine, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the area adjudged to her by this decree; and the State of New Hampshire, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the area adjudged to her by this decree.

17. The costs of this action shall be equally divided between the two States, and this case is retained on the docket for further orders, in fulfillment of the provisions of this decree.

By the Court

UPTON, SANDERS & SMITH

10 Centre Street

Concord, N. H. 03301

November 7, 1974

Hon. Tom C. Clark
Supreme Court Justice (Retired)
U. S. Supreme Court Building
Washington, D. C. 20543

Re: No. 64, Original, New Hampshire v. Maine

Dear Mr. Justice Clark:

I believe you have already received a copy of letter from the Department of Justice to myself and Mr. Larouche, Assistant Attorney General of Maine, dated November 4. Both of us would like to have the original letter made a part of the record in this case and the same is enclosed.

A copy of this letter has been sent to Mr. Larouche.

Very truly yours,

Richard F. Upton

RFU/mph

Enclosure

cc: Charles R. Larouche, Esq.
Assistant Attorney General
State House
Augusta, Maine 04330

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C. 20530

November 4, 1974

Address Reply to the
Division Indicated
and Refer to Initials and Number
MWR:RJG
90-4-19

Charles R. Larouche, Esquire
Assistant Attorney General
State of Maine
Augusta, Maine 04330

Dear Mr. Larouche:

Re: New Hampshire v. Maine, S. Ct.,
No. 64, Original

Thank you for your letter of October 25, 1974, enclosing a copy of the Motion to Amend the Motion for Entry of Judgment by Consent of the parties in the above-captioned case. We understand that this amending motion was filed with the Special Master by mailing dated October 24, 1974.

The purpose of this letter is to confirm that the Department of Justice was consulted concerning the text of the amending motion and will have no objection to the granting of the amended motion for entry of judgment by consent.

Thank you for your cooperation.

Sincerely,
Assistant Attorney General
Land and Natural Resources Division
By:
Ralph J. Gillis
Attorney, Marine Resources Section

cc: Honorable Thomas C. Clark
Associate Justice (Ret.)
Supreme Court of the United States
Washington, D. C. 20543
Richard F. Upton, Esquire
Special Counsel
10 Centre Street
Concord, New Hampshire 03301

Supreme Court, U. S.
FILED
JAN 19 1976
MICHAEL RODAK, JR., CLERK

No. 64, Original

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE STATE OF NEW HAMPSHIRE, Plaintiff

v.

THE STATE OF MAINE, Defendant

RESPONSE OF THE STATE OF MAINE TO NEW HAMPSHIRE'S EXCEPTIONS

Joseph E. Brennan
Attorney General

Donald G. Alexander
Assistant Attorney General

Edward F. Bradley, Jr.
Assistant Attorney General
State House
Augusta, Maine 04333

Counsel for Defendant
The State of Maine

Of Counsel
Robert J. Stolt
Assistant Attorney General

No. 64, Original

In the
Supreme Court of the United States

OCTOBER TERM, 1975

THE STATE OF NEW HAMPSHIRE, Plaintiff

v.

THE STATE OF MAINE, Defendant

RESPONSE OF THE STATE OF MAINE TO NEW HAMPSHIRE'S EXCEPTIONS

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The State of Maine

Of Counsel
Robert J. Stolt
Assistant Attorney General

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STATEMENT OF THE CASE

In April of 1974, Special Master Thomas Clark urged Maine and New Hampshire to resolve their lateral boundary dispute by agreement. In accordance with that request, counsel for Maine and New Hampshire met and agreed that the only principle which was appropriate for determining the location of the States' boundaries in Piscataqua River and Harbor and in Gosport Harbor was the middle of the main channel navigation or thalweg. Thalweg was the basis for the line submitted by the Motion for Entry of Judgment by Consent which Maine and New Hampshire subsequently filed. (Maine Brief in Support of Exceptions, Appendix p. 16, ¶ 3). In the report filed October 4, 1974, the Special Master rejected the boundary established in the consent decree he had encouraged the parties to enter, and recommended an entirely new boundary located in the geographic middle of the river. Both Maine and New Hampshire filed exceptions to the Master's report. Maine's exceptions were limited to a defense of the consent decree and the principle of thalweg which it had agreed upon with New Hampshire. New Hampshire did not object to the Master's rejection of the consent decree it had filed with Maine. Despite its written agreement that the middle of the channel of navigation established the lateral marine boundary, New Hampshire found the reasons for the Master's rejection of the principle "largely unanswerable," (New Hampshire's Brief in Support of Exceptions, p. 3) and accepted the Master's recommendation of geographic middle because the boundary created, by applying that concept, "is more favorable to it than that recommended in the proposed consent decree." (*Id.*, p. 3)

In its exceptions, New Hampshire objects to the Master's use of low tide elevations to determine the geographic middle of Piscataqua Harbor, the end point of the straight line portion of the proposed marine boundary. If New Hampshire's objection to the use of low tide elevations is accepted, the resulting boundary will deprive Maine to an even greater extent than the line proposed in the Master's report. (Appendix A) Throughout this litigation the State of Maine has abandoned its litigating posture to enter agreements in reliance upon assurances that the boundary dispute would thereby be finally resolved. Quite understandably, therefore, the State of Maine has been disturbed by the Master's rejection of the consent decree and the failure of the State of New Hampshire to defend it. In its exceptions, the State of Maine has presented

substantial legal support for this Court's acceptance of the consent decree,[1] and Maine will, hereafter, set out substantial legal arguments in opposition to New Hampshire's exceptions. Legal arguments aside, the State of Maine believes that New Hampshire has taken unjustifiable advantage of Maine's reliance on New Hampshire's representations that the litigation would be finally resolved by the consent decree. For this reason alone, equity demands that this Court reject the arguments which New Hampshire has presented in opposition to the consent decree the parties have represented as the final resolution of their marine boundary dispute.

1. New Hampshire's objections to the use of low tide elevations are erroneous.

The Special Master chose the low tide elevation on Whaleback Reef as a point to determine the geographic middle of Piscataqua River at the harbor mouth. (Report p. 42, n. 84) New Hampshire contends that the Master incorrectly used low tide elevations because the river must be measured from its banks. In support of this contention, New Hampshire cites several Supreme Court decisions. (New Hampshire's Brief, p. 5). None of these decisions cited by New Hampshire involves the measurement of geographic middle or contains more than an off-handed reference to the banks of the river. In the cases where it has used the geographic middle, the Supreme Court has measured from islands located in the riverbed. *Georgia v. South Carolina*, 257 U.S. 516, 522, (1922); *Washington v. Oregon*, 211 U.S. 127, 136 (1908). Most recently in *Texas v. Louisiana*, Sup. Ct. No. 36 Orig., the Special Master measured the geographic middle of the water boundary between Texas and Louisiana from islands in the north end of Sabine Lake. (Report of the Special Master, pp. 12 to 13). Consequently New Hampshire's contention that the geographic middle must be measured from the banks of the river is in direct conflict with the decisions which have actually addressed the question.

1 In its Brief in support of its exceptions, the State of Maine provided several examples of consent decree agreements which the Court has accepted. In his report filed in *Texas v. Louisiana*, Supreme Court #36 Original, the Special Master accepted the agreement which the states had reached concerning their river boundary and recommended that it be accepted by the Court. The Special Master wrote that "Concessions were made by each of the two states in order to reach amicable settlement of the boundary in this area" (Report p. 6, n. 3). In a report already adopted by this Court, the Special Master appointed in *United States v. Florida*, Supreme Court #52 Original, accepted an agreement the parties had reached regarding the method for locating Florida's offshore boundary (Report p. 53). See also *Texas v. Louisiana* (Report of the Special Master, p. 31).

New Hampshire also argues that the Special Master's use of low tide elevations is inconsistent with Articles 4, 7, 11 and 12 of the Convention of the Territorial Sea and Contiguous Zone, 15 U.S.T. 1606. (New Hampshire's Brief, pp. 13-24)

Article 7 permits construction of bay headlands to islands which are part of the mainland, *United States v. Louisiana*, 394 U.S. 11, 66 (1969). New Hampshire argues that the river midline should be measured from low tide elevations which meet the requirements for islands which are part of the mainland, but contends that the low tide elevations on Whaleback Reef do not satisfy these requirements. The Special Master in *United States v. Louisiana*, (Report, Supreme Court #9 Original) (1969), conducted lengthy and extensive hearings to determine whether Louisiana elevations were part of the mainland. No decision on the use of low tide elevations of Whaleback Reef should be made without similar factual development.

Article 4 permits straight base lines to be drawn only to low tide elevations on which a lighthouse or similar installations have been constructed. By analogy New Hampshire argues that this Article does not permit the Whaleback low tide elevations to be used to measure the geographic middle of the river. New Hampshire's position is clearly incorrect. Article 4 would permit straight base lines to be drawn to the low tide elevations on Whaleback Reef because it is undisputed that a lighthouse which is permanently above high water has been constructed there. New Hampshire denies the lighthouse justifies the application of Article 4 in this case because Whaleback Reef does not satisfy the requirements of Article 7 as an island part of the mainland. (New Hampshire's Brief, pp. 15-16) This objection is erroneous because low tide elevations which satisfy Article 4 qualify as base line points without having to qualify in addition as islands part of the mainland.

Article 11(1) provides that low tide elevations can be used to measure the territorial sea base line. New Hampshire argues that Article 12 which permits the use of low tide elevations to determine the geographic middle of the territorial sea of opposing states cannot be applied to determine the geographic middle of the internal waters of the river. New Hampshire reaches this conclusion because Article 11 low tide ele-

vations which Article 12 incorporates do not extend the limits of internal waters and therefore cannot be used in the determination of a river boundary dispute which involves the division of internal waters. (New Hampshire's Brief, p. 24) This objection is wholly irrelevant. The use of the provisions of the Convention on the Territorial Sea is based on the analogy of the banks of the river to the base line of the territorial sea or coastline. Articles 4, 7, 11 and 12 all establish principles for determining the coastline. If the coastline provisions in Article 4 and Article 7 are relevant to determine the geographic middle of the river, then the coastline provisions of Article 11 and 12 are also relevant. Thus, if the analogy to the Territorial Sea Convention is appropriate, it would be anomolous to exclude the only Convention provision which specifically provides for the determination of the geographic middle of a water boundary separating opposing sovereign states.

2. New Hampshire's objections to the use of low tide elevations require a full evidentiary hearing.

All New Hampshire's arguments in opposition to the Master's use of low tide elevations depend upon substantial factual assumptions. Thus, New Hampshire argues that the royal decree of 1740 does not delimit the middle of the river by reference to low tide elevations because contemporary maps do not depict low tide elevations the Master has used (Brief, pp. 4 to 5); that the banks of Piscataqua, not low tide elevations, must be used because the water between Whaleback Reef and Gerrish Island is the same as the water between the Reef and New Hampshire bank (Brief, pp. 6, 9), and because the practice has been to ignore low tide elevations in constructing median lines for river and offshore lateral boundaries (Brief, pp. 10 to 13, 24 to 28); that equity demands use of Wood Island because it results in proportionate distribution of lobsters and shellfish (Brief, p. 28); and that Whaleback Reef does not meet the requirements of any principle that would permit the use of low tide elevations to measure the geographic middle (Brief, pp. 7, 9). All this evidence has been submitted for the first time in New Hampshire's Brief in Support of its Exceptions to the Report of the Special Master. It is clear to Maine that New Hampshire's brief contains serious mistakes of fact. Several maps contemporaneous with the 1740 decree depict offshore elevations in the vicinity of Whaleback Reef. In fact, the Reef is named on several charts published within a reasonable period of the issuance of the decree.

Moreover, the river between Gerrish Island and Whaleback Reef is totally dissimilar from the river between the Reef and the New Hampshire shore. Commercial navigation inside Whaleback Reef is precluded because of the danger presented by shoal waters which exist there. Moreover, no significant fisheries are conducted by fishermen of either state landward of the harbor mouth line drawn by the Special Master. Finally, the practice of determining midlines in rivers and in offshore areas is at best contradictory. In several cases this Court has used islands, not the banks of the river to determine the river midline, supra, p. 3. In addition, the Special Master in this case has indicated several examples of the resolution of offshore boundary disputes by reference to low tide elevations. (Report p. 42, n. 84)

This Court cannot adopt a line which is different from the line proposed in the joint consent decree without permitting full development of the facts. To do otherwise would be to contradict the Court's normal liberal allowance for the full development of facts in controversies between sovereigns involving issues of high public importance. *United States v. Texas*, 162 U.S. 1 (1896); *Kansas v. Colorado*, 185 U.S. 125, 144, 145, 147 (1902); *Oklahoma v. Texas*, 253 U.S. 465, 471 (1920). In *United States v. Texas*, 339 U.S. 708 (1950), this Court held that a full hearing would be essential if there were disputes as to the meaning of documents and the answer was to be found in the contemporary construction, usage of international law and the like. (at p. 715) New Hampshire's allegations regarding low tide elevations create, for the first time, a dispute regarding the meaning of the 1740 decree which can be resolved only by contemporary construction and usage as well as international and domestic practice. Maine is entitled to a full hearing on all these issues before the Master's use of low tide elevations is rejected.

3. Equity requires an equal allocation of navigational access in the river.

New Hampshire concludes that the boundary determination must result in an equal division of significant river uses. (New Hampshire's Brief, p. 28) Thus since the federal navigational servitude allegedly guarantees equal navigational access, New Hampshire asserts that the only state interest affected by the division of the Piscataqua River is equal distribution of the living resources of the bed, i.e., lobsters and shellfish. (id. at p. 28) It is the position of the State of Maine that access to

navigation is the only significant state interest which will be affected by the boundary determination in the Piscataqua River. While jurisdiction over the fisheries is a significant concern outside the river mouth between Portsmouth and the Isles of Shoals, jurisdiction over navigation for pilotage and pollution control purposes is an extremely significant concern of each State inside the river.[2] The charts of the area establish that the area between the Reef and Gerrish Island is not deep enough to admit significant commercial navigation. In his report in *Texas v. Louisiana*, the Special Master held it would be "inequitable to locate the geographic middle of the Sabine River in an insignificant channel to the west of where the main volume of the Sabine waters flow." For the same reason, it would be inequitable to locate the geographic middle of the Piscataqua River by reference to Wood Island, depriving Maine of access to and jurisdiction over significant commercial navigation which occurs in the river.[3] In this case the only equitable allocation of navigational access and jurisdiction which can be obtained by locating the geographic middle of the Piscataqua River is obtained by measuring the midpoint from Whaleback Reef.

---

2 Despite its recognition of the navigational rights accruing to states as members of the union, this Court has constantly applied principles designed to insure unimpeded navigational access in state boundary disputes *Arkansas v. Tennessee*, 246 U.S. 352 (1918); *New Jersey v. Deleware*, 291 U.S. 352 (1934). Moreover, the independence of the colonies in 1740 when Maine's boundary was described made guarantees of navigational access extremely important.

3 The midpoint New Hampshire measured from Wood Island to Jaffray Point is not equi-distant from Odiorne's Point. Thus, even if it is demonstrated that low tide elevations at Whaleback Reef cannot determine the geographic middle of the river, New Hampshire has not given any explanation which justifies its failure to use the further point the Special Master used to locate the geographic middle of the river. (Report, p. 42, n. 84) If all three points are used, the equi-distant point does not intersect the harbor mouth and a discontinuous boundary results. This is the situation which the State of Maine warned in its Brief in Support of Exceptions (p. 4).

CONCLUSION

The midpoint claims now advanced by New Hampshire have not been subjected to the factfinding process of an adjudication. They are put forth without review of the Special Master or review by the other party, the State of Maine. This is not the appropriate proceeding in which to consider the line proposed by New Hampshire. The only considerations presented for decision here are whether the consent decree should be accepted or whether, alternatively, the Court should accept the Master's report. The State of Maine believes itself bound to its representations in the Motion for Entry of Judgment by Consent and therefore does not advocate any alternative line in the present proceedings.

The potential for further costly and time consuming litigation raised by New Hampshire's suggestion of an alternative line should be a clear indication to the Court of the necessity of adopting a firm policy in favor of consent agreements as a necessary and proper method of solving such disputes. That policy will clearly be affirmed by adoption of the consent decree presented by both parties in this matter. The policy will be seriously compromised and extensive litigation encouraged if the consent decree is rejected and the Court proceeds to consider New Hampshire's claims on their merits. Parties will be very reluctant to explore the likelihood of consent resolution if application for approval of the decree might result in an adjudication causing a result very different from that originally contemplated.

For the foregoing reasons, this Court should reject the Exceptions of the State of New Hampshire and enter the decree proposed by the States of Maine and New Hampshire.

Respectfully submitted,

Joseph E. Brennan
Attorney General

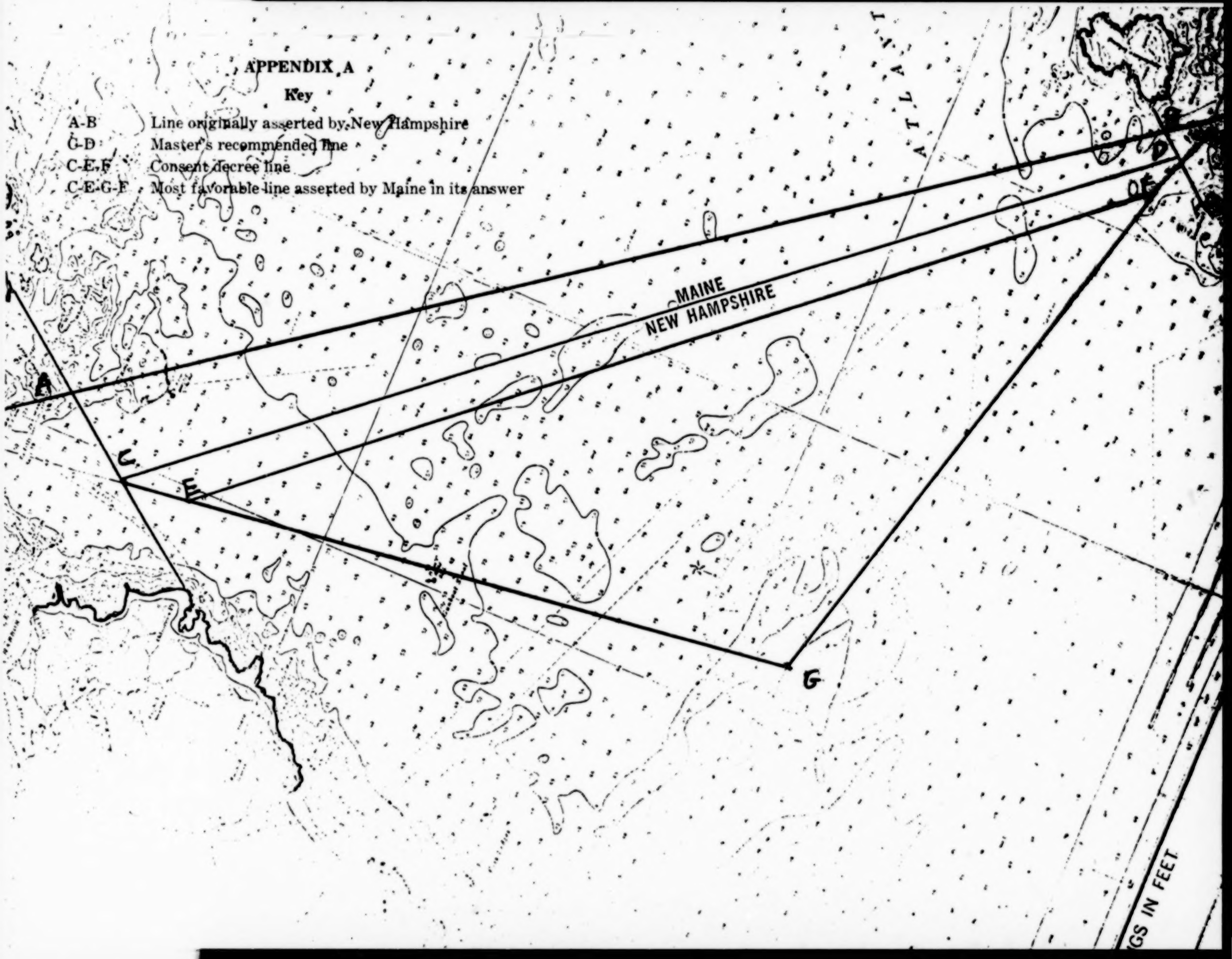
Donald G. Alexander
Assistant Attorney General

Edward F. Bradley, Jr.
Assistant Attorney General

APPENDIX A

Key

A-B	Line originally asserted by New Hampshire
G-D	Master's recommended line
C-E-F	Consent decree line
C-E-G-F	Most favorable line asserted by Maine in its answer



RECEIVED
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 64, Original

The State of New Hampshire,
Plaintiff
v.
The State of Maine,
Defendant

REPLY BRIEF OF THE PLAINTIFF

David H. Souter
Attorney General
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Special Counsel
10 Centre St.
Concord, N.H. 03301
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The State of New Hampshire

Of Counsel:
William S. Barnes
52 Beacon St.
Boston, Mass.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1975

No. 64, Original

The State of New Hampshire,
Plaintiff

v.

The State of Maine,
Defendant

REPLY BRIEF OF THE PLAINTIFF

Introduction

In this brief in reply to the defendant's exceptions to the report of the Special Master, New Hampshire will present its argument as to why these exceptions are not meritorious and therefore should be overruled.

The defendant, State of Maine, took only two exceptions to the findings and rulings of the Special Master, viz.:

(1) To his ruling that "geographic middle" of the Piscataqua, rather than the "thalweg" should be used to determine the terminus of the boundary at Portsmouth Harbor, historically called Piscataqua Harbor.

(2) To his ruling recommending the rejection of the motion for entry of judgment by consent of plaintiff and defendant.

Summary of Argument

The "geographic middle" of the Piscataqua, rather than the "thalweg", was more probably in accord with the intention of the King in Council in its order or decree of April 9, 1740, fixing the boundary between the Province of New Hampshire and the District of Maine. The parties' pleadings, arguments, and appeals, and the decision of the provincial Boundary Commissioners in the period 1737-1740 show that all the participants in this boundary dispute were probably thinking in terms of "geographic middle" rather than "thalweg". The use of "geographic middle" as the boundary line at the mouth of the harbor results in a more equitable division of fishing territory. No problem as to equality of navigation rights exists in the disputed water area.

The motion for entry of a consent decree should have been rejected, because the proposed decree was determined to be contrary to the law on the record before the Special Master. The Special Master was required to review the proposed consent decree and weigh it against the law and the evidence on the record before him (see stipulation for record as reported by Special Master, Report pp. 2-3), for this review was an essential part of the "judicial process" and fundamental to this Court's jurisdiction. New Hampshire represents that it is prepared, *if necessary*, to file a motion for leave to withdraw from the pending motion for entry of a consent decree, if this Court rules that the Special Master was correct in adopting, as the boundary, the "geographic middle" of the Piscataqua rather than the "thalweg", and in locating the closing line of the mouth of Portsmouth Harbor where he did.

Preliminary Statement

Neither the plaintiff nor the defendant have excepted to the following ruling and finding of the Special Master (Report, p. 4)

> "In the event the Court decides that the proposed consent decree cannot be entered, the dispute submitted to the Court and referred by it to the Special Master can be resolved on the stipulated record now before the Special Master, without further evidentiary hearings."

At pages 7 and 10 of the defendant's brief in support of its exceptions, the statement is made that New Hampshire cooperated with Maine in "extensive surveys of the bottom of the river" which determined where the river bottom merged with the ocean bottom. This statement is an error, no doubt inadvertently caused by changes in personnel in the Office of the Attorney General of Maine. If any such bottom surveys were ever undertaken, New Hampshire never took part in them and never was informed of the results thereof. It is erroneous to assert that New Hampshire is in agreement therewith.

The findings of fact of the Special Master are entitled to a presumption of correctness. While this Court is not strictly bound by the Federal Rules of Civil Procedure, Rule 53(e)(2) is declaratory of general law and practice when it states that "the court shall accept the master's findings unless clearly erroneous". And in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 at 689, this Court held that it was error to reject the findings of fact of a master if they are "supported by substantial evidence and are not clearly erroneous". See also *Patrol Valve Co.* v. *Robertshaw-Fulton Controls Co.*, 210 Fed(2) 146, and *In Re Lurie*, 267 Fed.(2) 33.

I. THE SPECIAL MASTER WAS CORRECT IN REJECTING THE "THALWEG" AS THE RIVER BOUNDARY AND APPLYING THE RULE OF "GEOGRAPHIC MIDDLE"

A. *"Thalweg" is a newer and more modern rule of interpretation, not in use in 1740.*

Whenever the phrase "middle of the river" has to be interpreted as here, there are two possible interpretations, i.e., the thalweg (or middle of the channel of navigation) and the geographic middle of the river. We are here asking the Court to interpret the words "middle of the river" as used in an Order in Council dated April 9, 1740. We must put ourselves in the position of those adopting this Order in Council in 1740 and determine what the law was *at that time*. See *The Grisbadarna Case*, Scott, Hague Court Reports (1916) 121 at 127: "We must have recourse to the principles of law in force at that time (1658)".

Prior to the early 19th century, the law designated the boun-

dary in a river to be the geographic middle or median line. 3 Verzijl, International Law in Historical Perspective (1970), 553 et seq. The thalweg principle was first proposed in 1797 in the Congress of Ratstadt, and was first employed in the Treaty of Luneville, 1801. 3 Verzijl, *supra*, 554; Cukwurah, The Settlement of Boundary Disputes in International Law (1967). 52; *New Jersey* v. *Delaware*, 291 U.S. 361, 381-383 (1934). The thalweg theory spread to other European waterways in the first decades of the nineteenth century, but its development in North America was slower. 3 Verzijl, *supra*, 534-535. It "was not authoritative doctrine prior to 1892 . . .,and certainly not . . .in 1812." *Texas* v. *Louisiana*, 410 U.S. 702, 709 (1973). Clearly, the thalweg rule did not exist in 1740 and the "middle of the river" was considered to be the geographic median line.

The long list of precedents cited in Verzijl, *op. cit.*, is most persuasive of his viewpoint as to the relatively modern origin of the thalweg doctrine.

The "thalweg" rule of interpretation rests on a line of cases beginning with *Iowa* v. *Illinois*, 147 U.S. 1 (1892). It is a rule of interpretation recognized with reference to federal statutes defining boundaries of newly admitted states. However, this Court has always said that the key question is the "intent of Congress" or other legislative body enacting a boundary instrument.

The case of *New Jersey* v. *Delaware*, *supra*, is in a sense, distinguishable, because there the Court was not interpreting a boundary instrument; it was fixing a boundary where none had authoritatively existed before. Thalweg was selected as more equitable under the circumstances of that case.

But in 1740 the "geographic middle" or median line was the governing tool of interpretation under international law, and the Special Master was correct in applying it here.

B. *The intention of those participating in the proceedings leading to the Order in Council of April 9, 1740 was to use "geographic middle" as the Piscataqua boundary.*

The parties to the boundary dispute and their representatives, in their arguments and pleadings, and the provincial Boundary Commissioners in their decision, preliminary to the final decision of the King in Council in 1740, showed that they considered there to be a difference in meaning between the

words "middle of the river" and the words "middle of the channel of the river", and used these words with some precision and as if they had different meanings.

In New Hampshire's demand filed with the Boundary Commissioners, August 1, 1737, its committee laid claim to a southern boundary beginning "at the end of three miles north from the middle of the channel of the Merrimack River where it runs into the Atlantic Ocean". In contrast the New Hampshire claim to the northern boundary was to "begin at the entrance of Piscataqua Harbor & so to pass up the same into the River of Newichwannock & through the same into the furthest head thereof," with no further amplification as to the division of the River, if any. *N.H. State Papers*, Vol. XIX, pp. 283, 284; see Appendix I.

Massachusetts' original demand submitted to the same Boundary Commissioners, August 5, 1737 did not use this language at this time and claimed "Black Rocks" on the northern side of the Merrimack River as a point of reference. *N.H. State Papers*, vol. XIX, pp. 290; see Appendix II. In Massachusetts' subsequent answer to New Hampshire's claim, its agents reiterated that the southern boundary of New Hampshire should be measured from "Black Rocks" and rejected the use of the "Middle of the channel of the Merrimack River" as a base point. *N.H. State Papers*, vol. XIX, 299 at 309; see Appendix III. New Hampshire's use of the "middle of the channel" as the base point rather than "Black Rocks" appears to have been motivated by the fact that the main channel of the Merrimack River had, over a period of time, moved southerly from "Black Rocks", almost a mile, and thus its use as a point of reference would give New Hampshire a belt of additional territory, one mile in width. See *N.H. State Papers*, XIX, at 592; see Appendix V. It appears that, at its mouth, the Merrimack River was then a little over one mile in width; thus the reference to the "channel" (i.e., deepest part of the River*) rather than to the "middle" of the River is significant. See Mitchell's Plan, Appendix C to Report of Special Master herein.

* Webster's International Dictionary (2d ed.) defines "channel" as "the deepest part of a river, harbor, strait, etc., where the main current flows or which affords the best passage".

The decision of the Boundary Commissioners September 2, 1737, accepted Massachusetts' claim as to the point of beginning of the southern boundary of New Hampshire, which was set at a point "three English miles north from the Mouth of said River beginning at the southerly side of Black Rocks so called at low water mark." As to the northern boundary of New Hampshire, the decision provided "that the Dividing Line Shall pass up thro' the Mouth of Piscataqua Harbor & up the middle of the River, etc. etc." N.H. *State Papers,* vol. XIX, 391, 392; see Appendix IV. This was the first time the phrase "middle of the river" was used, during this controversy, with respect to the northern boundary.

Both New Hampshire and Massachusetts appealed to the Privy Council from the decision of the Boundary Commissioners. In New Hampshire's appeal, one of the grounds was again a protest of the use of "Black Rocks" as a point of reference for calculating the position of the southern boundary, rather than the "middle of the channel of the (Merrimack) River". As to the northern boundary, New Hampshire appealed from the ruling that the boundary went up "the middle of the Piscataqua River", on the ground that the whole river belonged to New Hampshire and urged that this part of the decision, "which in consequence adjudges *half of the river* to Massachusetts without any demand by, or any Title in, Massachusetts, will be reversed". *N.H. State Papers,* XIX, 565 at 591 and 596-597 (Appendix V) As noted by the Special Master, the New Hampshire agents interpreted "middle of the River" to mean its geographical middle by their conclusion that the decision had awarded "half the River" to Massachusetts (Report at pp. 40-41).

In Massachusetts' appeal (which related to the course of the southerly boundary), an effort was made to answer New Hampshire's appeal. Massachusetts again urged rejection of the "the middle of the channel of the Merrimack River" as a base point for the southern boundary. As for the northern boundary, Massachusetts claimed that the Commissioners were correct in fixing the boundary at "the middle of the Piscataqua River", asserting that there were numerous islands in the River and that in past history the two provinces had in

practice accepted the middle of the river as the boundary "the Fact being, That all the Islands in the said River have been always considered and taxed as belonging to the Government they lay nearest to". By this language it seems clear that Massachusetts interpreted "middle of the river", as used in the decision, to mean the geographic middle as had New Hampshire. *N.H. State Papers,* vol. XIX, 601 at 622, 627; Appendix VI.

On appeal, the decision of the Boundary Commissioners was modified by the Privy Council as to the southern boundary but affirmed as to the northern boundary. (Report at pp. 30-31; Appendix VII.)

The decision as to the northern boundary within the Piscataqua River acquires greater significance when it is remembered that the deepest part of the Piscataqua River and Harbor, proceeding southeasterly from Fort Point to the mouth of the Harbor (i.e., the mouth as located by the Special Master) lies substantially closer to the New Hampshire shore than to the Maine shore, and has been so marked by modern range lights and a range line for the navigation of ships. See U.S. Coast and Geodetic Survey Chart No. 211 filed as Appendix A to Special Master's Report. Thus if the more modern "thalweg" doctrine should be chosen as the basis of the state boundary (despite the Special Master's rejection of the same), the state boundary line would cross the closing line of the harbor substantially closer to the New Hampshire shore than to the Maine shore, with the additional effect of deflecting the entire state boundary between Portsmouth and the Isles of Shoals in a southwesterly direction, to the prejudice of New Hampshire.

The present case, therefore, presents an even stronger background for an interpretation of "geographic middle" than existed in *Texas* v. *Louisiana,* 410 U.S. 702 (1973), where this Court also rejected thalweg in favor of geographic middle, as the river boundary, based on its construction of the intent of Congress. The intention of the King in Council here was more probably the same.

C. *Where there is freedom of navigation, the case for use of the thalweg rule is much weaker.*

In *Texas* v. *Louisiana, supra,* this Court pointed out that "within the United States, two states bordering on a navigable

river would have equal access to it for purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg" 410 U.S. at 709-710.

In the colonial period of New Hampshire history, water traffic on the Piscataqua appears to have been free alike to the inhabitants of New Hampshire and southern Maine. A close examination of Vols. I-III (inclusive) Laws of New Hampshire (1670-1774) reveals no colonial statutes restricting free passage of vessels in the river and harbor. The trade instructions of the British government to Governor Benning Wentworth (1741) Vol. II, Laws of N.H., 638 at 646 (par. 19) indicate that all ships of British registry, i.e., owned by British subjects or inhabitants of any of her Colonies, were "qualified to trade to, from or in any of our Plantations in America". In "Ports of Piscataqua" by William G. Saltonstall (Harvard Univ. Press, 1941), it is made clear that shipbuilding, fishing and seagoing commerce were extensively carried on out of the Maine towns of Kittery, Eliot and Berwick on the northerly shore of the Piscataqua, as well as out of Portsmouth, New Hampshire on the southerly shore, both prior to and after 1740, a condition which would not have been likely to exist unless there was freedom of passage on the Piscataqua to inhabitants of both provinces. See Saltonstall, *op. cit.* at pp. 12, 18, 21, 23, 31-33, 29, 39, 44, 54.

The thalweg rule is more adapted to use where the river boundary is between two separate nations, and where equal access to the navigable portion of the river may *not* be available. As between two states of the United States, this cannot be the case.

Thus in *Georgia* v. *South Carolina*, 257 U.S. 516 at 522 (1921), this Court held that the state boundary in the Savannah, Tugaloo and Chattooger Rivers lay along the geographic middle rather than the thalweg. The key to the decision was Article 2 of the Beaufort Convention of 1787 between the two states, which provided for equal and unrestricted right to the citizens of each state to navigate the boundary rivers. Said the Court: "Thus article 2 takes out of the case any influence which the thalweg or main navigable channel doctrine * * * might otherwise have had* * * *"

Similarly in *Wisconsin* v. *Michigan*, 295 U.S. 455 (1935),

freedom of navigation existing, the Court selected the geographic middle of Green Bay from the mouth of the Menominee River, out into the lake, as the state boundary. An equitable division of territory was held important because conflict over fishing rights had precipitated the litigation. 295 U.S. at 462.

A prominent modern commentation supports this view.

> "The function of a river — the manner in which a river is used — should be the determining factor in deciding which type of boundary will be applied *in concerto*." Bouchez, The Fixing of Boundaries in International Boundary Rivers, 12 Intl. & Comp. LQ. 789 (1963) at 797. "[I]f, for example, fishing is also important, then it is perhaps more equitable to apply the median line, provided that it is stipulated expicitly that there is free navigation in the whole river for ships belonging to both nations." Id. at 798.
>
> "Such a system of delimitation has been practiced in, for instance, the Passammaquoddy [sic] Bay. In pursuance of such regulations freedom of navigation is guaranteed while each nation controls a fishing area of equal size. In all other cases — in all situations in which navigation is not a relevant factor — the median line, in general is to be preferred. Even when the interests are dissimilar the median line is the best solution. The main argument supporting the latter statement is that both States under such a solution are entitled to claim equal amounts of the water of the river." Id.

II. THE RULING AND FINDING OF THE SPECIAL MASTER FIXING THE LOCATION OF "THE MOUTH OF PISCATAQUA HARBOR" WAS CORRECT.

The motion for entry of judgment by consent of the parties does not state where the "mouth of Piscataqua Harbor" is located. Indeed, since the motion mistakenly proceeds under the thalweg rule, the location of the mouth of the harbor is largely immaterial. Under the thalweg rule, the boundary follows the center of the channel of navigation as far out to sea as it can be traced, even though this point is beyond the mouth of "the harbor". Thus in *New Jersey* v. *Delaware*, *supra*, the

boundary was held to follow the channel of navigation far beyond the confines of any possible "harbor", i.e., for the full length of Delaware Bay (almost 50 miles), where the opposite shores are at many points 10 to 25 miles apart.

The proposed consent decree (par. 5) states where the end of the channel of navigation of the Piscataqua River is located. As claimed by the defendant Maine in its brief (p. 10), the end of the channel of navigation (as defined in the proposed decree) is where it is intersected by a line drawn from the tip of Odiornes Point northeasterly to whistling buoy No. 2KR at Kitts Rocks. Kitt Rocks are a reef which is under water at all times, even at low water. Thus Kitts Rocks is not even a "low tide elevation" (See New Hampshire's exceptions and supporting brief at part I). Whatever the appropriateness of using the Kitts Rocks' buoy as a point of reference to mark the termination of the channel of navigation, it is entirely inappropriate to mark the "mouth of the harbor" as those words were used in the decree of 1740. It is difficult to dispute the logic of the Special Master's report (at page 36) where he says:

> "Since the question is the meaning of the 1740 decree, it cannot be said that uncharted 'rocky reefs' or later navigational aids could have played any part in the deliberations of the King and Commissioners but rather a location on more solid land was intended."

Kitts Rocks do not appear on the Mitchell Plan drawn for the Boundary Commissioners in 1737 (App. C to Special Master's Report).

The Special Master has found and ruled that "the mouth of the harbor" is a straight line connecting the tip of Odiornes Point with the tip of Gerrish Island just southwest of Seward's Cove (Report at p. 34). These points are actually the "headlands" on opposite shores at the mouth of the harbor. It would be a logical and reasonable interpretation to draw the closing line of the harbor here, because this location is where the regime of internal waters ends and the regime of the territorial sea begins. Therefore, this line should be the location. The background evidence indicates that the decree of 1740 looked to this location of the mouth of the harbor. The exhaustive review of ancient maps and documents and of statements by

reliable historians, made by the Special Master (Report at pp. 32-36), fully supports this location of the harbor's mouth.

At the 1930 Hague Conference for the Codification of International Law, the subcommittee dealing with the subject reported as follows;

> "When a river flows directly into the sea, the waters of the river constitute inland waters up to a line following the general direction of the coast across the mouth of the river, whatever its width" Shalowitz, Shore and Sea Boundaries (Dept. of Commerce, 1962) vol. I at p. 62.

The same author states: "Both with respect to true bays and rivers, the line marking the seaward limit of inland waters is a headland-to-headland line" Shalowitz, *op. cit.*, vol. I at 63. The definition of "headlands" set forth by Shalowitz (*op. cit.* vol. I at pp. 63-65) is entirely consistent with the finding and ruling of the Special Master as to the location of the harbor's mouth in the instant case. It should be noted that there are no permanent harbor works outward of this line.

In the final report of the Special Master in *United States* v. *California*, 332 U.S. 19, filed November 10, 1952, at pp. 46 and 47 of his report, the Special Master followed the language of the subcommittee of the Hague Conference quoted above, *verbatim*, in the section of his report entitled "River Mouths".

Article 13 of Section II of the 1958 Geneva Convention states:

> "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low tide line of its banks."

Shalowitz *op. cit.* at p. 62 note 74 regards Article 13 as the equivalent of the earlier language of the Hague Conference subcommittee quoted above. If the line runs to the "banks", this would preclude the use of Kitts Rocks as a terminus of the closing line. In the supplemental decree of this Court in *United States* v. *California*, 382 U.S. 418 (1966) in pars. 4(a) and 5, the same general view of the law is taken:

"In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of mean low water meets the outermost extension of the headlands."

See also *United States* v. *Louisiana*, 394 U.S. 11 (1969) at pp. 58-66 and report of the Special Master thereon at pp. 30-32. The location of the "headlands" used to draw the closing of the harbor must be such as to "enclose landlocked waters". Kitts Rocks would not do this, since it is submerged at all times and a large gap of territory exists between No. 2KR whistling buoy and the Maine coast.

See also the report of the Special Master (at pp. 27 and 53 of the report) in *United States* vs. *Florida*, U.S. , (no. 52, orig; 43L. Ed(2) 375), as to the location of the mouths of the St. Mary's and St. Johns Rivers. This report was confirmed by this Court as to these particular rivers.

III. THE SPECIAL MASTER WAS CORRECT IN RECOMMENDING THE REJECTION OF THE MOTION FOR ENTRY OF JUDGMENT BY CONSENT.

A. *The effect of the decision in Vermont v. New York.*

Vermont v. New York, 417 U.S. 270 was decided by this Court June 3, 1974. It rejected a proposed consent decree in settlement of litigation between two states, falling within the original jurisdiction.

The grounds of the decision appear to be twofold: (1) That the settlement called for continuing supervision by the Court, a function more arbitral than judicial; and (2) that the settlement did not involve the exercise of the judicial power, i.e., the application of correct principles of law to the facts of the case. In regard to the second point, the Court said:

"Our original jurisdiction heretofore has been deemed to extend to adjudications of controversies between States according to principles of law, some drawn from the international field, some expressing a 'common law'

formulated over the decades by this Court. The proposals submitted by the South Lake Master to this Court might be proposals having no relation to law. Like the present decree they might be mere settlements by the parties acting under compulsions and motives that have no relation to performance of our Article III functions. Article III speaks of the 'Judicial power' of this Court, which embraces application of principles of law or equity to facts, distilled by hearings or by stipulations. Nothing in the proposed decree nor in the mandate to be given the South Lake Master speaks in terms of 'judicial power'."

The text and significance of this decision were not known by counsel in the present action at the time the proposed settlement herein was finally agreed to. The subsequent filing of a stipulation regarding the record "for decision of this action" was intended to provide the Special Master with a basis for exercising judicial power. This stipulation regarding the record is fully reported by the Special Master at pages 2-3 of his report.

The Court in *Vermont* v. *New York*, *supra*, suggested that the parties might more appropriately compose their differences either by an interstate compact or by an out-of-court settlement agreement providing for dismissal of the complaint. Neither vehicle is available here. An interstate compact was attempted here and failed (Report, p. 6). An agreement of lesser stature than an interstate compact, would require legislative action, at least in New Hampshire, in view of the provisions of RSA 1:15 of New Hampshire, establishing a boundary in the disputed area obviously unacceptable to Maine. RSA 1:15 is binding on all public officers of New Hampshire, unless and until changed by statute, interstate compact or judgment of this Court (see Appendix VIII hereto). Furthermore, the legislative branch of the New Hampshire government by concurrent resolution adopted as recently as March 7, 1975, expressed disapproval of the consent decree proposed herein (see Appendix IX hereto). This concurrent resolution was noted and discussed by the Special Master at page 3, note 2 of his report.

The foregoing background makes clear the improbability of resolution of this boundary dispute except by exercise of the judicial power of this Court. However, *Vermont* v. *New York*,

supra, makes it clear that this Court will not approve a consent decree, in litigation between two states, unless the process of approval or disapproval involves the exercise of judicial power.

B. *Proposed consent decrees in interstate boundary litigation should not be perfunctorily approved, in any event.*

In such boundary cases, this Court has said on occasion that it proceeds only with the utmost circumspection and deliberation. *Iowa* v. *Illinois*, 151 U.S. 238.

A proposed consent decree, as here, involves an agreement between officers of the executive branches of the governments of the two states, which is presented to this Court for approval. It does not take effect *until approved;* hence it is entitled "motion for entry of judgment by consent of plaintiff and defendant". Unless approved by this Court in the exercise of the judicial power, such an agreement (settling a common state boundary) could not take effect and become binding, unless approved by the Congress. "No state shall, without the consent of Congress * * * enter into an agreement or compact with another state * * * *" U.S. Const., Art. I, s. 10, cl. 3.

As said in *Florida* v. *Georgia*, 58 U.S. (17 Howard) 478:

> "And if Florida and Georgia had by negotiation and agreement proceeded to adjust this boundary, any compact between them would have been null and void without the assent of Congress."

The Court in that case alludes to the danger that the Compact Clause of the Constitution will be circumvented if the states are permitted to present a proposed adjustment of their dispute which may be approved by the Court without careful examination, including hearing the Attorney General of the United States. Since an interstate boundary agreement cannot ordinarily take effect until it is approved by the Congress, it might be considered a "circumvention" of the Compact Clause for the states to incorporate the same agreement in a proposed consent decree for approval of this Court, unless, of course, this Court deliberately exercises the "judicial power" in reviewing and approving or disapproving the proposed settlement.

C. *The exercise of judicial power requires that the Court independently examine the proposed consent decree and grant or withhold approval in accordance with the applicable law, and the evidence in the record.*

In previous cases within its original jurisdiction, the Court has occasionally adopted a consent decree or stipulation of the parties, but in these cases, the Court has usually declared the applicable law, after a hearing, and then given the parties leave to submit a decree or stipulation consistent with the opinion of the Court. *Virginia* v. *Tennessee*, 148 U.S. 503, 158 U.S. 267 at 271; 177 U.S. 501; *Nebraska* v. *Iowa*, 143 U.S. 359 at 370; 145 U.S. 519; *Missouri* v. *Nebraska*, 196 U.S. 23; 197 U.S. 577; *Iowa* v. *Illinois*, 147 U.S. 1; 151 U.S. 238; 202 U.S. 59; *Georgia* v. *South Carolina*, 257 U.S. 516 at 523; and *Arizona* v. *California*, 373 U.S. 546, 595 and 602.

In *Kentucky* v. *Indiana*, 281 U.S. 163, judgment was rendered on the pleadings because of admissions made in the defendant's answer. In *Utah* v. *United States*, 394 U.S. 89 at 94-95, a stipulation was approved during the trial, which narrowed the issues.

In *Wisconsin* v. *Illinois*, 388 U.S. 426, the Court adopted the findings of fact of the Special Master made after a trial, but then adopted a proposed consent decree of the parties based on these findings, without reviewing the legal conclusions of the Special Master. However, the Court was in a position to review and determine the legal propriety of the proposed decree in the light of the Master's findings of fact.

In *Arizona* v. *California*, 373 U.S. 546, a subsidiary branch of the case involved the conflicting claims of water rights by Arizona and New Mexico in a tributary, the Gila River. The Special Master ruled that this issue should be governed by the legal principles of "equitable apportionment", and then conducted an evidentiary hearing on this issue. Thereafter, the two states made a compromise settlement of this issue which the Master reviewed, accepted and incorporated in his findings, conclusions and recommended decree. No exceptions were taken by any party, and the Court accepted the Master's recommendations. Again, this was an exercise of "the judicial power". The applicable law was declared, evidence was received, and then the parties stipulated; the Master was in a

position to review the legal propriety of the parties' stipulation and obviously found it consistent with the law and the evidence, when he adopted it as his own.

In the case at bar, the proposed consent decree moved by the parties, goes further than any of those approved by the Court in the cases cited above. Here the parties by their motion have not only stipulated as to certain facts but also as to the applicable law. And the stipulations as to facts in the motion were *limited* and confined to a few basic conclusions of fact without any background evidence. Thus the judgment of the Court would probably not have been invoked, but for the subsequent filing of a stipulation of the parties providing a more detailed evidentiary record "for the decision of this action" (Report, pp. 2, 3).

In *Pope* v. *United States*, 323 U.S. 1 at 12, it was held that judgment by consent may be a judicial act so long as it involves the application of legal principles to facts ascertained "by proof or by stipulation".

What standards should the Court apply in reviewing a motion for entry of judgment by consent of the parties in a case between two states under its original jurisdiction? The motion does require the approval of the Court in order to become a judgment; and in order to have jurisdiction to give or refuse approval, the Court should be in a position to act judicially with reference thereto. What is appropriate in private litigation may be wholly inappropriate in cases involving important public rights.

We suggest that the proper standards are these in cases such as this one: The proposed consent decree should only be approved (1) if the Court determines that it is based upon correct principles of law, independently determined by the Court to be applicable, and (2) if the Court determines that the stipulated facts are sufficiently detailed and complete to make possible the exercise of independent judgment as to what the applicable law is. In this connection, the Court or its Special Master may always require an evidentiary hearing or a further stipulation of facts in areas of the case where it finds the proposed consent decree to contain insufficient factual material.

D. *The proposed consent decree is based upon incorrect principles of law and an insufficient stipulation of facts and should have been rejected.*

In the light of *Vermont* v. *New York*, supra, it is evident that a proposed consent decree will not be adopted unless presented in a context which invokes "the judicial power". The Special Master apparently believed that he was being presented with a *fait accompli*, which did not require the exercise of any judgment on his part, so he recommended disapproval, and proceeded to decide the case on the record before him.

Actually, his ultimate rulings show that the proposed consent decree could not have been approved, *in any event*. It is based upon incorrect principles of law (1) in that it applies the "thalweg" rule instead of the "geographic middle" rule as set forth in detail in part I of this brief, and, (2), in that it fails to apply the "headland rule" in determining the location of the mouth of the harbor as set forth in detail in part II of this brief. A consent decree based upon principles of law, determined by the Court to be incorrect, cannot be approved, for this would not be an exercise of the judicial power. *Vermont* v. *New York, supra; Pope* v. *United States, supra.*

Further, the stipulations as to facts in the proposed consent decree are inadequate to enable a court to exercise judgment on the issues. Pars. 3, 5, 6, 7 and 8 are the only paragraphs in the proposed decree which contain factual evidence, as distinguished from conclusions of law (See text in appendix to Maine's principal brief, pp. 24-27). None of the historical background which eventually persuaded the Special Master to use "geographic middle" as the boundary, appears in these paragraphs. It was only when the parties later supplied the Special Master by stipulation with a record of supplemental facts (Report pp. 2, 3) that there was sufficient factual evidence before the Court to permit the exercise of an independent judgment in this case.

IV. THE PRESENT POSITION OF NEW HAMPSHIRE WITH RESPECT TO THE PROPOSED CONSENT DECREE.

New Hampshire has always assumed that the motion for entry of judgment by consent would be granted *only if* the Court

was satisfied that it was based upon correct principles of law in the light of the factual background, and that it would be rejected if the Court determined otherwise. Based upon this assumption, New Hampshire did not file a motion for leave to withdraw from the motion for entry of the consent decree, at the time the Special Master filed his report recommending its rejection.

However, if the Court now determines that the Special Master was correct in his ruling of law applying the principle of "geographic middle" to the river boundary and in locating "the mouth of the harbor", but that the Court is constrained to accept the consent decree notwithstanding, then we now represent to the Court that, in such event, New Hampshire desires to be relieved of participation in and consent to the motion for entry of judgment by consent, and is prepared to file a motion for leave to withdraw therefrom.

Judgment by consent requires the existence of consent at the very moment the court undertakes to make the agreement the judgment of the court. See 47 Am.Jur.(2) 141 *Judgments*, s. 1083, "Necessity of consent — effect of withdrawal"; *Lee* v. *Rhodes*, 227 N.C. 240; 41S.E(2) 747; *Van Donselaar* v. *Van Donselaar*, 249 Iowa 504, 87 N.W.(2) 311; *Burnaman* v. *Heater;* 150 Tex. 333; 240 S.W.(2) 288; *Re Cartnell's Estate*, 120 Vt. 234; 138 Atl.(2) 592; *In Re Thompson's Adoption*, 178 Kans. 127; 283 Pac(2) 493.

V. CONCLUSION

We respectfully submit that the exceptions of the defendant State of Maine should be overruled. The Special Master correctly located the "mouth of Piscataqua Harbor" and correctly applied the rule of "geographic middle" instead of "thalweg" to determine the river boundary. The motion for entry of judgment by consent of the parties was properly rejected because it is contrary to applicable principles of law and based upon stipulations of facts insufficient in detail to enable the Court to determine the applicable law.

Respectfully submitted
The State of New Hampshire
By David H. Souter
Attorney General
/s/Richard F. Upton
Special Counsel,
Counsel for Plaintiff

Of Counsel:
William S. Barnes

I. Excerpt from New Hampshire's demand as to boundary, filed with the Boundary Commisioners August 2, 1737, *N.H. State Papers*, vol. XIX, 283, (A. S. Batchellor ed., Manchester, 1891):

* * * *

"In behalf of His Majesty & of his Governm' of the Province of New Hampshire We do demand & Insist that the Southern boundary of Said Province should begin at the end of three Miles North from the Middle of the Channel of Merrimack River where it runs into the Atlantic Ocean, and from thence would run on a Straight Line West up into the Main Land (towards the South Sea) until it meets with His Majesty's other Governments —

"And that the Northern Boundary of New Hampshire should begin at the Entrance of Piscataqua Harbour & so to pass up the Same into the River of Newichwannock & through the Same into the furthest head thereof and from thence North Westward (that is North less than a quarter of a point Westerly,) as far as the British Dominion Extends, and also the Western half of the Isles of Shoals, we say lyes within the Province of New Hampshire —"

* * * *

II. Excerpt from Massachusetts' demand dated August 5, 1737 filed with the Boundary Commissioners, *N.H. State Papers*, vol. XIX, 290 at 291:

* * * *

"NOW therefore Pursuant to these Antient Grants from the Crown made above a hundred years agoe acknowl-

edged and more particularly explained in that Judicial Determination of the King in Council and recited and Confirmed in the Province Charter. The Province of the Massachusetts Bay Claim and demand Still to hold and possess by a boundary Line on the Southerly Side of New Hampshire beginning at the Sea three English miles North from the black Rocks So called, at the Mouth of the River Merrimack as it Emptied it Self into the Sea Sixty years agoe, thence running Parralel with the River as farr Northward as the Crotch or parting of the River, thence due North as far as a certain Tree Commonly known for more than Seventy Years past, by the Name of Indicots Tree, Standing three English miles Northward of said Crotch or parting of Merrimack River, And from thence due West to the South Sea, which they are able to prove by Antient and Incontestable Evidences are the bounds intended Granted and Adjudged to them as aforesaid; which Grant and Settlement of King Charles the 2d Anno 1677 as abovesaid, we Insist upon as Conclusive and Irrefragable.

"AND on the Northerly side of New Hampshire a boundary Line beginning at the Entrance of Piscataqua Harbour passing up the Same to the River Newichwannock through that to the furthest head thereof, and from thence a due Northwest Line, till one hundred and twenty miles from the Mouth of Piscataqua Harbour be finished, which is the extent of the Province of the Massachusetts Bay on that part, And therefore We doubt not but that you will Judge it just and reasonable to Order the bounds and lines beforementioned to be run, mark'd out and Established accordingly, so far as New Hampshire extends; and desire that plans thereof may be made for the perpetual Remembrance of them —"

III. Excerpt from Massachusetts' answer to New Hampshire's demand dated August 1737 filed with the Boundary Commissioners, *N.H. State Papers*, vol. XIX, 293 at 309-310:

* * * *

"and therefore there is not the least Shadow of reason to maintain that the South bounds of the Province of New Hampshire should begin at the end of three Miles North from the middle of the now Channell of Merrimack River, where it now runs into the Ocean according to their Modern claim, but the said Southerly boundary line must and ought and always was held and acknowledged to begin at the End of three Miles North from the black Rocks aforesaid at the Mouth of the said River, as it emptied it Self into the Sea Sixty Years ago,"

* * * *

IV. Decision of the Boundary Commissioners given at Hampton, New Hampshire, September 2, 1737, *N.H. State Papers*, vol. XIX, 391, 392:

"Prov. of) Hampton Septr the 2, 1737, at a Court of N. Hamp^{r}) Commiss^{rs} Appointed by His Majesty's Commission under the Great Seal of Great Britain to Settle Adjust & Determine the Respective Boundaries of the Provinces of the Mass^{a} Bay & New Hamp^{r} in New England then & there held.

"In Pursuance of His Majesty's afores^{d} Commission the Court took under Consideration the Evidences, Pleas & Allegations offerd & made by Each party referring to the Controversy depending between them and upon mature Advisement on the whole, a doubt arose in point of Law & the Court thereupon came to the following resolution viz That if the Charter of King William & Queen Mary Dated Octob^{r} 7th in the third Year of their Reign Grants to the Province of the Mass^{a} Bay all the Lands which were Granted by the Charter of King Charles the first Dated March 4th in the fourth Year of his Reign to the late Colony of the Mass^{a} Bay, lying to the Northward of Merrimack River then the Court Adjudge & Determine, that a Line Shall run Parallel with the Said River at the Distance of three English Miles North from the Mouth of

the Said River beginning at the Southerly Side of the black Rocks So called at Low water mark & from thence to run to the Crotch or parting of the Said River where the Rivers of Pemigewasset & winnepiseoke meet and from thence due North three English Miles & from thence due West towards the South Sea until it meets with His Majestys other Governments—which shall be the boundary or Dividing Line between the Said Prov^{s} of the Mass^{a} Bay & New Hamp^{r} on that Side—But if otherwise then the Court Adjudge & determine that a line on the Southerly Side of New Hamp^{r} beginning at the Distance of three English miles North from the Southerly Side of the black Rocks afores^{d} at Low Water Mark & from thence running due West up into the Main Land towards the South Sea until it meets with His Majestys other Governm^{ts} Shall be the boundary Line between the Said Provinces on the Side afores^{d}—which point in doubt with the Court as afores^{d} they Humbly Submit to the wise Consideration of His Most Sacred Majesty in his Privy Council to be determined according to His Royal Will & Pleasure therein—

"And as to the Northern Boundary between the Said Provinces the Court Resolve & Determine that the Dividing Line Shall pass up thro' the mouth of Piscataqua Harbour & up the Middle of the River into ye River of Newichwannock (part of which is now called Salmon Falls) & thro' the Middle of the Same to the furthest head thereof & from thence North two Degrees Westerly until one hundred & twenty Miles be finished from ye Mouth of Piscataqua Harbour Afores^{d} or until it meets with His Majestys other Governm^{ts} and that the Dividing line shall part the Isles of Shoals & run thro' the Middle of the Harbour between the Islands to the sea on the Southerly Side & that the Southwesterly part of the Said Islands Shall lye in & be Accounted part of the Prov. of New Hamp^{r} & that ye North Easterly part thereof shall lie in & be Accounted part of the Prov. of the Mass^{a} Bay & be held & Enjoyed by the Said Prov^{s} Respectively in the Same manner as they Now do & have heretofore held and Enjoyd the Same—And the Court do further Adjudge that y^{e}

Cost & Charge arising by taking out the Commission as also of the Commissrs & their officers Viz the two Clerks Surveyer & Waiter for their Travelg Exps & attendance in the Execution of the Same be Equally born by the Said Provs

Ph Livingston
Will:Skene
Eras: Jas Philipps
Otho Hamilton
John Gardner
John Potter
George Cornell"

* * * *

V. Excerpts from New Hampshire's appeal to the Privy Council, July 20, 1738, *N.H. State Papers*, vol. XIX, pp. 565 at 591-592 and 596-597:

* * * *

"As to the southern Boundary of New Hampshire, the first Question in the natural Order is, where that boundary Line shall begin? New Hampshire insisted that three Miles should be taken North from the middle of the Channel of the River, where it runs into the Atlantick Ocean; and the Massachusets, by their Demand before the Commissioners, insisted it should begin, at the Sea. but three Miles North from the Black Rocks, where (as they groundlessly pretended, but never proved) the River had emptied itself 60 Years ago. — The late Attorney and Sollicitor General, after considering the Massachusets new Charter, and being attended by Cousel on both sides seven or eight several times, had reported that, according to the Intention of that new charter (which recited their old Charter also) the Line ought to begin three Miles North of the Mouth of the River, where it empties itself into the

Sea; but the Commissioners have directed it to begin three Miles North from the Mouth of the River, beginning at the sourtherly Side of the Black Rocks, at Low-Water Mark, which is indeed four Miles North of every part whatsoever of the Mouth of the River as appears by Inspection of the Commissioners Plan; for the Black Rocks lay deep in a Bay, considerably within the River's Mouth, and a Mile or more, North of every part whatsoever of the Mouth of the River, wherefore, considering this single Point either under the Massachusets old Charter, or under their new one, under neither of their Charters were they to go more than three Miles to the northward of that River, whereas measuring three Miles from the Black Rocks, in the Elbow or Bay, up within the side of the River, it really gives to the Massachusets four Miles North of the Mouth of the River;"

* * * *

"As to the northern Boundary, the Commissioners Judgment directs the dividing Line to pass up the middle of Piscataqua River and through the middle of Newichwannock River; but it's hoped that that is wrong: For, if recourse be had to the Grant from the Crown of the Province of Maine, made to Sir Ferdinando Gorges, it will appear that no part of the Rivers were granted to him, but only Maine Land, between the Rivers of Piscataqua and Sagadahocke; consequently if he did make any Conveyance to the Massachusets, (which has been pretended, though not proved) he could not convey to the old Colony of the Massachusets any part of either of those Rivers which he himself had no Title to. — And, upon looking into the new Charter to the Province of the Massachusets, where the Lands which made the Province of Maine are granted to them, it will appear that the same Land is again granted, in the same Terms, as a Portion of main Land between the said Rivers. — The Massachusets never possess'd, or claimed, the River itself, or any part of it, neither under their old or new Charter; nor, in their De-

mand filed before the Commissioners, did they demand half or any part of the River: So that it's humbly hoped this part of the Commissioners Judgment, which in consequence adjudges half of the River to the Massachusets without any Demand by, or any Title in, the Massachusets will be revers'd."

VI. Excerpt from Massachusetts' appeal to the Privy Council, submitted March 5, 1739, *N.H. State Papers*, vol. XIX, 601 at 622-623 and 627-628:

"And that those material Words of 'any and 'every Part thereof,' inserted in the former Charter, are omitted in the present; and therefore this Northern Line must, agreeable to the present Charter, begin three Miles North from the Middle of the Channel of Merrimack River, where it runs into the Atlantick Ocean, and from thence should run on a strait Line West up into the main Land towards the South Sea; or that otherwise it will not hold the same Breadth, but will vary with every Turn of the River; and that when the River ceases to run a direct West Course, it cannot be a Northern Boundary.

"This Objection proceeds on a Supposition, that this Case is to rest on the present Charter, without any Regard had to the former, and the judicial Determination made upon it: For admit them into the Consideration, (as the Massachusetts humbly insist they must) the Whole of this Objection is immediately overturned."

* * * *

"New Hampshire insist, That the Commissioners have done wrong in directing the Northern Line to run thro' the Mouth of Piscataqua, and so up the Middle of the River; insisting Gorges's Patent doth not pass any Right to the River, and that the Whole of that River, and the Jurisdiction thereof, hath ever been in the Possession of New Hampshire, and never claimed by the Massachusetts.

"By the express Words of Gorges's Grant, the Line must run thro' the Mouth of Piscataqua, and up the Middle of the River, it being impossible to run the Line agreeable to the Description of that Grant, without.

"And (notwithstanding what New Hampshire have surprisingly insisted on to the contrary) Possession and Enjoyment have been agreeable hereto, it being a known Truth, that from Time immemorial the Province of Maine have and now do possess and receive Taxes constantly from all the Islands lying in that River, on that Side towards the Province of Maine; and the Massachusetts aver in the most solemn manner, That New Hampshire have never in any one Instance exercised the Jurisdiction of the whole River, and that the Province of Maine have constantly possessed and enjoyed the Islands all along their Side of the River — the Fact being, That all the Islands in the said River have been always considered and taxed as belonging to that Government they lay nearest to."

* * * *

VII. The Recommendations of the Appeal Committee of the Privy Council to the King. *N.H. State Papers*, vol. XIX, 600:

"THE CASE
OF HIS MAJESTY'S PROVINCE OF
NEW HAMPSHIRE.
upon two APPEALS

"Relating to the Boundaries between that Province and the Province of the Massachusets Bay.

"To be heard before the Right Honourable the Lords of the Committee of his Majesty's Most Honourable Privy-Council for hearing APPEALS from the Plantations, at the Council-Chamber at Whitehall.

"Wednesday 5th March 1739. at 6, in the Evening & again on 10th March —

"Ordd and adjudged —

"That the Northern Boundarys of the Province of the Massachusets Bay are and be a Similar Curve Line pursuing the Course of Merrimack River at three Miles Distance on the North side thereof beginning at the Atlantick Ocean and ending at a Point due North of a Place in the Plan returned by the Commissrs called Pantucket Falls and a Strait Line drawn from thence due West cross the said River till it meets with His Majestys other Governmts And it is further Ordered that the rest of the Commissrs Report or Determination be Affirmed—"

* * * *

Note: The above recommendation was approved by Order in Council dated April 9, 1740, reported in 2 Laws of N.H., App. 793-794; see Report at p. 30.

VIII: NEW HAMPSHIRE REVISED STATUTES ANNOTATED: 1:14-15

Seaward Limits of Jurisdiction [New]

1:14 Extent. Subject to such lateral marine boundaries as have been, are herein or shall hereafter be legally established between this state and the state of Maine and the commonwealth of Massachusetts, the territorial limits and jurisdiction of this state shall extend to and over, and be excercisable with respect to, waters offshore the coast of this state as follows:

I. Marginal Sea. The marginal sea to its outermost limits as said limits may from time to time be defined or recognized by the United States of America by international treaty or otherwise. The coastal baseline of this state from which the breadth of the marginal sea is measured shall be drawn in conformity with the treaties to which the United States is a party. Subject to future change as hereinabove

setforth, the marginal sea is three nautical miles in breadth.

II. The High Sea. Beyond the marginal sea, to the outer limits of the territorial sea of the United States of America and to whatever limits may be recognized by the usages and customs of international law or any treaty or otherwise according to law. This state claims title for a distance of two hundred nautical miles from the coastal baseline of the state, or to the base of the continental shelf, whichever distance is the greater.

III. Submerged Land. All submerged land, including the subsurface thereof, lying under the aforementioned waters.

Source. 1973, 580:1, eff. July 5, 1973.

1:15 Lateral Boundaries. Until otherwise established by law, interstate compact or judgment of the supreme court of the United States, the lateral marine boundaries of this state shall be and are hereby fixed as follows:

I. Adjoining the State of Maine: Beginning at the midpoint of the mouth of the Piscataqua River; thence southeasterly in a straight line to the midpoint of the mouth of Gosport Harbor of the Isles of Shoals; thence following the center of said harbor easterly and southeasterly and crossing the middle of the breakwater between Cedar Island and Star Island on a course perpendicular thereto, and extending on the lastmentioned course to the line of mean low water; thence 102° East (true) to the outward limits of state jurisdiction as defined in RSA 1:14. As to that section of the lateral marine boundary lying between the mouth of the Piscataqua River and the mouth of Gosport Harbor in the Isles of Shoals the so-called line of "lights on range", namely, a straight line projection south-easterly to the Isles of Shoals of a straight line connecting Fort Point Light and Whaleback Light shall be prima facie the lateral marine boundary for the guidance of fishermen in the waters lying between Whaleback Light and the Isles of Shoals.

II. Adjoining the Commonwealth of Massachusetts: As defined in chapter 115, 1901; and thence one hundred and seven degrees East (true) to the outward

limits of state jurisdiction, as defined in RSA 1:14.

III. The fixation of lateral marine boundaries herein is without prejudice to the rights of this state to other marine territory shown to belong to it. By the fixation of the foregoing lateral marine boundaries, this state intends to assert title to its just and proportional share of the natural resources in the Atlantic Ocean lying offshore its coastline and within the limits defined in RSA 1:14.

8Source. 1973, 580:1, eff. July 5, 1973.

IX:THE STATE OF NEW HAMPSHIRE

HOUSE CONCURRENT RESOLUTION

Resolved by the House of Representatives; the Senate concurring;

That, the General Court, being the duly elected representatives of the sovereign people of the state of New Hampshire, in light of chapters 58, 564 and 580 of the laws of 1973, hereby declares that it regards that section of the lateral marine boundary between the states of New Hampshire and Maine lying between the mouth of the Piscataqua River and the mouth of Gosport Harbor in the Isles of Shoals to be the line of "lights on range", so-called, as defined in RSA 1;15, I; and

That, the general court is of the opinion that no agreement, undertaking or stipulation by any officer, representative, attorney or agent of the state of New Hampshire, which would have the effect of establishing as said section of the lateral marine boundary any line other than said line of "lights on range" shall bind the state of New Hampshire, unless such agreement, undertaking or stipulation is entered into in accord with RSA 1:15; and

That, the general court hereby urges the attorney general and special counsel actively to claim and defend in any litigation currently pending in The United States Supreme Court said line

of "lights on range" or a line claimed to be the true and legal boundary line by the amicus curiae pursuant to the order of the special master in said litigation issued on December 16, 1974.

(adopted March 7, 1975)

MOTION FILED

DEC 23 1975

Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 64, ORIGINAL.

THE STATE OF NEW HAMPSHIRE,
PLAINTIFF,

v.

THE STATE OF MAINE,
DEFENDANT.

Motion and Brief of Amicus Curiae, the New Hampshire Commercial Fishermen's Association.

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Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 64, ORIGINAL.

THE STATE OF NEW HAMPSHIRE,
PLAINTIFF,
v.
THE STATE OF MAINE,
DEFENDANT.

Motion of New Hampshire Commercial Fishermen's Association for Leave to File Brief as Amicus Curiae.

The New Hampshire Commercial Fishermen's Association respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the plaintiff herein has been obtained, but the attorney for the defendant herein has refused to consent to the filing of a brief by the New Hampshire Commercial Fishermen's Association as *amicus curiae*.

On September 20, 1974, the proposed *amicus curiae* (hereinafter the "Association") moved for leave to intervene in this case. The motion was referred to the special master who, on December 16, 1974, denied the motion, to which the Association excepted. However, the special master allowed the Association to proceed as *amicus curiae*, and in that capacity it filed briefs and memoranda on the legal and fac-

tual matters at issue in the dispute. (Report of the Special Master, Tom C. Clark, filed October 8, 1975).

The Association is an organization composed of New Hampshire lobster fishermen, who have clear, definable, and significant interests in the maritime area disputed in the instant case. The special master so recognized in his Order on Proposed Intervention (p. 2); "[T]he petitioning fishermen are obviously quite 'interested' in the outcome of the dispute . . . ." The fishermen's primary interest in the maritime area is that they earn their very livelihoods therefrom. They are but the latest of countless generations of New Hampshire fishermen who have traditionally fished in these waters. Possessing lobster licenses issued by the state of New Hampshire, the fishermen, and their predecessors, have traditionally fished in the area up to the line of "lights on range" (drawn in Appendix A to the accompanying brief). Because the businesses and livelihoods of the fishermen are derived from this area, and because of the long tradition of fishing in this area by New Hampshire fishermen, there is an intimate relationship between the fishermen and the disputed waters.

If the disputed area, or any part thereof, should be decreed to appertain to Maine, the fishermen will, pursuant to Maine law, be excluded from fishing in these areas. Maine law prohibits catching lobsters in Maine waters without a license (Me. Rev. Stat. Ann., 12 § 4404); and only legal residents of the state are entitled to such a license (Me. Rev. Stat. Ann., 12 § 4404[4]). Therefore, New Hampshire fishermen will be unable to fish in any portion of these traditional grounds in the disputed area which may, as a result of this case, become Maine territory, and these fishermen will thereby lose a commensurate portion of their income.

Moreover, the fishermen will be unable to transport lobsters of certain sizes, lawfully caught in New Hampshire

waters, through such portions of the disputed area which may appertain to Maine as a result of this case. Depending upon where the boundary line is ultimately drawn, this may prevent fishermen from transporting their catch by the most direct route to New Hampshire ports. This results from existing provisions of Maine law, which punish the possession in Maine territory of lobsters under 3 3/16 inches long, and over 5 inches long (Me. Rev. Stat. Ann., 12 § 4451 (1, 2). The minimum size applicable in New Hampshire is 3 1/8 inches (N. H. Rev. Stat. Ann., 211:27). This 1/16 inch difference is substantial, as it represents one year's growth of the lobster. New Hampshire law imposes no maximum size limit.

The Association believes that the true, legal boundary between the two states is one of three alternative lines, two of which lie to the northeast of the lines claimed by either of the parties. One line (Alternative 2 in Appendix A hereto) coincides with a line which will be contended for by New Hampshire. The Association has no reason to believe that the factual and legal arguments in support of the correctness of the other two lines will be presented to this Court by either party. If these arguments are approved by the Court, more of the disputed territory would appertain to New Hampshire, thus preserving the fishermen's traditional fishing rights therein, than would be the case with the lines contended for by either of the parties.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 64, ORIGINAL.

THE STATE OF NEW HAMPSHIRE,
PLAINTIFF,
v.
THE STATE OF MAINE,
DEFENDANT.

Brief of Amicus Curiae.

Summary of Argument.

The boundary in issue, which has never been formally established, should be determined in accordance with the long established usage by fishermen in both states, who have traditionally and historically considered the boundary to be the "lights on range" line. The disputed area already belongs to the respective states. This is not a case involving the acquisition of territory which is *res nullius*, or the acquisition by one state of territory formerly belonging to the other; rather the Court is called upon to establish the boundary line in territory which already appertains to the respective states. The boundary should therefore be drawn so as to preserve existing traditional fishing practices, and should be based on the relative strengths of the claims of each state. This is not a case which calls for the application of the doctrine of prescription.

The "lights on range" line is additionally supported by maps and other evidence.

If the "lights on range" line is not the boundary, then the boundary is a line connecting the intersection of the geographic median line in the Piscataqua River with the closing line of Portsmouth Harbor, and the intersection of the median line in Gosport Harbor with that harbor's closing line.

The closing line of Portsmouth Harbor is not the line reported by the special master, but rather is a line drawn from Frost Point to Gerrish Island. This is the line which comports with the evidence, and with the geography and hydrology of the area.

The middle of the Piscataqua River must be determined without reference to low tide elevations in the river. The Royal Decree of 1740, which established the boundary in the river, did so without reference to these elevations, as they were uncharted in 1740, and played no part in the proceedings which led to the Decree. The median line must be measured between the banks of the river in order to give effect to the underlying principle that each riparian owns one half of the river and river bed. To measure the line from low tide elevations in the river does violence to this principle. These elevations are merely points of barren rock which protrude at low tide, and are located well into the river as measured from its actual banks. They therefore cannot be assimilated to the banks of the river.

The practice in interstate and international river boundary delimitations has been to ignore low tide elevations in drawing the median line. This comports with the Territorial Sea Convention, which does not permit such elevations to extend internal waters. The rule in the Convention that territorial sea median lines may be measured from low tide elevations merely follows from the fact that such elevations possess their own territorial sea. The median line in actuality divides the territorial sea of one state as ex-

tended by the low tide elevation, and that of the opposite state. These elevations do not have their own zone of internal waters and cannot extend internal waters from the coast. There is no extended zone of internal waters to be taken into account, and therefore, the median line in internal waters, such as the river, should not be measured from low tide elevations.

Argument.

I. Introduction.

The background of the present dispute, and the history of the states, so far as relevant to the dispute, are contained in the Report of Tom C. Clark, special master, filed October 8, 1975 (hereinafter the "Report"). The following discussion is concerned with the special master's analysis, which the *amicus* contends resulted in a boundary line which is not the true, legal boundary between the states.

II. The Special Master Erred in Rejecting Theories Supporting the Lights on Range Line.

In view of the fact that the boundary here in question has never before been formally established, either by grant, agreement or decree[1] the actual *usage* of people on both sides of the territory to be divided should be the primary consideration in fixing the location of the line.

[1] The original colonies did not own the waters in question (Report, pp. 8-32. *United States* v. *Maine, et al.*, No. 35, Original, decision of March 17, 1975) and the states acquired ownership of territory only 22 years ago, with the Submerged Lands Act, 43 U.S.C. § 1301 et. seq. (*United States* v. *Maine, supra*). The 1740 Royal Decree was not concerned with, and did not delimit, the boundary here in issue, presumably because the area did not appertain to the colonies.

The line which has been recognized as the boundary *by the people who are actually concerned with and affected by the location of the boundary* should be the line which in law is the boundary between the states. These people are those who fish for lobsters in the area. They are so affected because citizens of one state are excluded from fishing in waters of the other, and because each state imposes in its waters different laws regulating the possession of lobsters of certain sizes, and other regulations. See Motion for Leave to File Brief as *Amicus Curiae, supra.*

The fishermen from *both* New Hampshire and Maine have—since an indeterminate time in history—regarded the "lights on range" line as the boundary between the states.[1a] They have historically and traditionally regarded waters southerly of this line to belong to New Hampshire and waters northerly of the line to belong to Maine. They have traditionally and historically considered it illegal to fish in waters on the other side of this line, and have consistently acted in accordance with this belief, refraining from fishing in waters beyond their respective sides of the line.

The "lights on range" line has long historical usage. One of the lights which marks the line, Portsmouth Harbor Light, was erected some time before 1784 (Snow, *The Lighthouses of New England* (1973), p. 121); the other, Whaleback Light, was built in 1829. Snow, *supra,* p. 126.

The *amicus* submits that this usage establishes the "lights on range" line as the boundary from the intersection of this line with the geographic median line of the Piscataqua River (See *infra,* pp. 14-15) to the middle of Gosport Harbor.

The principle that actual usage by the persons who are directly affected by the location of the boundary should,

[1a] This is an extension of an imaginary line connecting Portsmouth Harbor Light (on Fort Point) and Whaleback Light.

in cases such as this, be the primary consideration in fixing the location of the line, is supported by international as well as American law.

In the *Grisbadarna Case* (Scott, *The Hague Court Reports* (1916), p. 121), Norway and Sweden agreed to submit a maritime boundary dispute to an international tribunal, which was to fix the boundary in accordance with principles of international law. The tribunal drew the boundary so as to divide two important lobster banks, giving one to Norway and the other to Sweden. It justified this line by the fact that it "is supported by all the circumstances of fact" in the case (at p. 130). Ruling that

> "it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible" (at p. 130),

the tribunal drew the boundary line so as to give Sweden ownership of lobster grounds which had traditionally and historically been fished by Swedish fishermen, and Norway ownership of lobster grounds traditionally fished by Norwegians.

The existing "state of things" in the disputed area in the instant case closely parallels that in the *Grisbadarna Case*. The boundary between the two states should be drawn in conformity with the clear and long practice of lobster fishermen from both states (the only people directly affected by the location of the line) and should be drawn so as to maintain the jurisdiction of each state over those lobster areas in which its citizens have traditionally fished.

Similar considerations have been applied in boundary disputes decided by the United States Supreme Court. In *Vermont* v. *New Hampshire,* 289 U.S. 593; 53 S. Ct. 708; 77 L. Ed. 1392 (1933), an important basis for the boundary

adopted by the Court was that the line was adopted as the boundary in practice by people from both states. See also *Arkansas* v. *Mississippi,* 250 U.S. 39; 39 S. Ct. 422; 63 L. Ed. 832 (1919), holding that the practice of the inhabitants of disputed territory in recognition of a boundary has been given weight in several cases in which the true boundary was difficult to ascertain. The practice and general understanding of the inhabitants of the disputed area was also of great importance in fixing the boundaries in *Maryland* v. *West Virginia,* 217 U.S. 1, at 40-41, 46; 30 S. Ct. 268; 54 L. Ed. 645 (1910): "The people have generally accepted [the boundary] and have adopted it, and the facts in this connection cannot be ignored." Cf. *Indiana* v. *Kentucky,* 136 U.S. 479; 10 S. Ct. 1051; 34 L. Ed. 329 (1890) and *Virginia* v. *Tennessee,* 148 U.S. 503; 13 S. Ct. 728; 37 L. Ed. 537 (1893).

The sea area in dispute already belongs either to one state or the other (see the Submerged Lands Act, *supra*). The issue is, therefore, neither whether one state has acquired title to territory owned by no-one (*res nullius*), nor, whether one state has acquired territory which previously belonged to the other by acts sufficient to constitute prescription. The issue rather is how to delimit the boundary in a sea area already owned by the states. Such an issue is resolved by considering the relative strength of the claims of each side.

In the *Island of Palmas Case,* Permanent Court of Arbitration, Decision of April 4, 1928, reprinted at 22 American Journal of International Law 867 (1928), the United States and the Netherlands contested ownership of an island. The arbitrator, noting that the disputed island belonged either to the United States or to the Netherlands (p. 873), stated that if neither party could establish its claim to the island through continuous and peaceful display of sovereignty,

"the decision of the arbitrator would have to be founded on the relative strength of the titles invoked by each party" (p. 910). Similarly, in the *Minquiers and Ecrehos Case* (1953), International Court of Justice Rep. 47, a dispute between the United Kingdom and France over the ownership of certain islets in the English Channel, the Court stated, at p. 52:

> "Having thus been requested to decide whether these groups belong either to France or the United Kingdom, the Court has to determine which of the parties has produced the more convincing proof of title to one or the other of these groups, or to both of them. By the formulation of Article I [of the Special Agreement referring the dispute to the Court] the Parties have excluded the status of *res nullius* as well as that of the *condominium*."

The Court further noted that it was "called upon to appraise the relative strength of the opposing claims to sovereignty" over the islets (at p. 67).

By virtue of the practice of fishermen on both sides of the line, and in the absence of countervailing practices or claims by Maine, these considerations establish the "lights on range" line as the boundary between the two states.

The special master rejected the "lights on range" line as the boundary, saying that "[t]he conduct relied upon by *Amici* to establish the 'lights on range' line as the boundary by acquiescense, long usage, and prescription is simply not the sort of official governmental conduct which has been held to trigger the invocation of these equitable doctrines." (Report p. 56.) The special master has mistakenly assumed that the *amicus curiae* rely upon prescription to establish the "lights on range" line as the boundary. As explained above, while it would be necessary to invoke this doctrine

to justify the acquisition by one state of territory formerly owned by another, or the doctrine of continuous and effective display of sovereignty to justify the acquisition of *res nullius*, neither of these situations are involved in the instant case. The sea area to be divided here already appertains to the respective states, and the task of the Court is to establish the location of the boundary. This is not a case involving the acquisition of territory, *and it is therefore not necessary to meet the rigorous standards of prescription or analogous doctrines.*

Moreover, while governmental acts were involved in the *Grisbadarna Case, supra,* these acts were not crucial to the outcome. The existing state of affairs and circumstances of fact which the Tribunal sought to preserve was "that lobster fishing in the shoals of Grisbadarna has been carried on for a much longer time, to a much larger extent, and by a much larger number of fishermen by the subjects of Sweden than by the subjects of Norway." Scott, *supra,* at p. 130. The exercise of limited governmental acts in the area was simply an additional circumstance which lent greater weight to the appurtenance of the Grisbadarna to Sweden. It is erroneous to assume that Sweden would not have obtained the Grisbadarna if it had not exercised such governmental acts. The area belonged either to Norway or Sweden. If Sweden's claim, by virtue of Swedish fishing activities, was stronger than Norway's, then, even without Swedish governmental acts, the territory still would have been awarded to Sweden, the stronger claimant.

Nothing in the decision in that case indicates that it was decided on the basis of prescription. Indeed, Sweden's acts were insufficient to have supported the acquisition of prescriptive rights. The decision, rather, was based on the relative strengths of the two countries' claims, and the

principle requiring the preservation of an existing state of affairs. These are the principles on which the *amicus* currently relies.

III. The Special Master Erred in His Definition of the Closing Line of Portsmouth Harbor.

Alternatively, if the Court agrees with the special master that the boundary is a straight line connecting the intersection of the median line of the Piscataqua River with the closing line of Portsmouth Harbor, and the intersection of the median line in Gosport Harbor with its closing line (Report, p. 50), the *amicus* disagrees with the closing line of Portsmouth Harbor adopted by the special master, and with his method of finding the relevant intersection points.

The *amicus* submits that the closing line of Portsmouth Harbor is a line drawn from Frost Point to Wood Island to Gerrish Island. (See Appendix A.) Historically, the entrance to the harbor was considered to be at Fort Point (Letter of E. Randolph to Lords of Trade and Plantations (1683), in Belknap, History of New Hampshire (1791), v. 1, p. 463. Plan of the Province of New Hampshire, by Robert Fletcher, Deputy Surveyor, December 14, 1768. id., 1769). Belknap, *supra*, placed the main entrance to the harbor "between the north side of Great-Island [now New Castle Island] and Kittery Shore. . . ." At p. 145. Similarly, Blunt, American Coast Pilot (1822) states, at 146, that Fort Point on New Castle Island marks the harbor's entrance. Sailing directions contained on United States Coast Survey "Preliminary Chart of Portsmouth Harbor," 1854, place the entrance to the harbor at Fort Point.

The Royal Decree of 1740 commences its delimitation of the boundary on the mainland at "the middle of Piscataqua Harbour," and runs the boundary from there northward,

through the middle of the rivers which divide the (then) Provinces. Maps drawn subsequent to 1740, to implement the Decree, commence at Fort Point, and then run northward (Plan by New Hampshire Deputy Surveyor, Robert Fletcher, 1768; same, 1769; Plan drawn under direction of a Committee appointed by New Hampshire General Court, by Blomstrand (?) and Clapham, 1788). These plans must be viewed as interpreting the Royal Decree to commence the boundary therein at Fort Point, and to designate "the middle of Piscataqua Harbour" as Fort Point.

In 1854, a chart was drawn by a United States—United Kingdom Fishery Commission pursuant to a bi-lateral fishing treaty of that year (See Malloy, U. S. Treaties, v. 1, p. 670), drawing the closing line for Portsmouth Harbor from Frost Point to Wood Island to Gerrish Island. The closing line drawn by the Commissioners was to determine the outer limit of United States internal waters, where foreign fishing would not be permitted, and the beginning of territorial waters, where it would. A harbor is considered internal waters (Colombos, International Law of the Sea (6th ed.; 1967), p. 87) where foreign fishing is not permitted (Sorensen, Manual of Public International Law (1968), p. 335). Fishing treaties typically allow foreign fishing only to the baseline which divides territorial from internal waters, and excludes foreign fishing in internal waters. See Treaties in Lay, et al., New Directions in the Law of the Sea (1973) v. 1, pp. 41-95. This was also provided in the United States—United Kingdom Treaty, Malloy, *supra*, v. 1, pp. 670, 709. This closing line must, therefore, be taken to mark the outer limit of the harbor. If the Commissioners had considered the limit of the harbor to be further seaward, it would have so indicated by drawing the closing line further out.

Other evidence establishes the entrance to the harbor at, or near, the Frost Point—Gerrish Island line. This line coincides with the entrance to the harbor described in May, Early Portsmouth History (1926) 77-78.

Furthermore, this line accords with the physical characteristics of the area. The area between Wood Island and Stielman's Rocks (northwesterly of Wood Island) marks the approximate divide between the calm waters of the harbor, and the turbulent waters seaward. A harbor is defined as "A haven, or space of deep water so sheltered by the adjacent land as to afford a safe anchorage for ships. . . .[A] sheltered place, natural or artificial on the coast of a sea. . . ." Black's Law Dictionary (4th ed., 1957), p. 847. The sheltered area, or haven, commences in the area of Wood Island. The harbor entrance must therefore be considered to be in this area.

Finally, the Frost Point—Gerrish Island line comports with the geography of the area. This line is drawn between what may reasonably be considered to be the headlands of the harbor. In law, the closing line of a bay or harbor, marking the division between internal waters and territorial sea, is measured and drawn between the headlands or banks of the harbor or bay. See Colombos, *supra,* at 178-180; Convention on the Territorial Sea and Contiguous Zone, done at Geneva, 29th April, 1958, 15 U.S.T. 1606; T.I.A.S. 5639 (hereinafter "Territorial Sea Convention"), Art. 13.

IV. The Special Master Erred in His Use of Low Tide Elevations.

The special master commences the boundary line at the point where the "middle" of the Piscataqua River crosses the closing line of the mouth of the harbor. Report, p. 49.

The *amicus curiae* agrees that the phrase "middle of the river" as used in the 1740 Decree means the geographic

median line of the river,[2] that is, "a continuous line following the meandering of the river and everywhere equidistant from the nearest points on opposite sides using the actual water edges at the mean low water line." Report, p. 42.[3] However, the *amicus* disagrees with the special master's taking into account low tide elevations in the river in drawing the median line, and his finding the point at which the median line crosses the mouth of the harbor by reference to such elevations.[4]

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[2] The special master correctly concluded that the phrase "middle of the river" in the 1740 Decree referred to the geographic median line, rather than the "thalweg." Report, pp. 41-42. The phrase must be interpreted in accordance with the principles of law in force in 1740. *The Grisbadarna Case*, Scott, The Hague Court Reports (1916) pp. 121, 127. Prior to the early 19th century, the law designated the boundary in a river to be the median line. 3 Verzijl, International Law in Historical Perspective (1970), 553 et seq. The thalweg principle was first proposed in 1797 in the Congress of Ratstadt, and was first employed in the Treaty of Luneville, 1801. 3 Verzijl, *supra,* 554; Cukwurah, the Settlement of Boundary Disputes in International Law (1967), 52; *New Jersey* v. *Delaware,* 291 U.S. 361, 381-383; 54 S. Ct. 407; 78 L. Ed. 847 (1934). The thalweg theory spread to other European waterways in the first decades of the nineteenth century, but its development in North America was slower. 3 Verzijl, *supra,* 534-535. It "was not authoritative doctrine prior to 1892 . . ., and certainly not . . . in 1812." *Texas* v. *Louisiana,* 410 U.S. 702, 709; 93 S. Ct. 1224; 35 L. Ed. 2d 627 (1973). Clearly, the thalweg rule did not exist in 1740 and the "middle of the river' was considered to be the geographic median line.

[3] For the method used to construct the median line, see Pearcy, "Geographic Aspects of the Law of the Sea," 49 *Annals of the Association of American Geographers* 1, 17-18 (1959); Boggs, "Delimitation of Seaward Areas Under National Jurisdiction," 45 *American Journal of International Law,* 240, 257 (1951). This was the method used by the special master in the instant case.

[4] The special master acknowledges that he did draw the median line by reference to low tide elevations in the river. Report, pp. 42-43, fn. 84. This has been confirmed by Mr. Justice Clark's law clerk, who also has supplied a chart showing the low tide elevations

The median line should be measured between the opposite banks of the river, on islands or the mainland, and should not be measured from low tide elevations.[5] Assuming the correctness of the special master's closing line, the point at which the median line crosses the harbor (which is the point at which the lateral marine boundary commences) should therefore be at point B shown on Appendix A, rather than at point A, adopted by the special master. The effect of taking into account low tide elevations in drawing the median line is to deflect in a southwesterly direction the junction of the median line with the harbor's closing line, and, therefore, the entire lateral boundary line.

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used by the special master. These are indicated on Appendix A hereto as points 1, 2 and 3. Whether the median line should be drawn by reference to low tide elevations was never, prior to the issuance of the Report of the special master, an issue in these proceedings, and therefore was never considered or addressed by the parties. No evidence directed to the issue was presented to the special master by either party, and the special master made no findings of fact in support of his conclusion. Consequently, if the Honorable Court believes that it requires certain evidence or factual findings in order to rule on this issue, the *amicus curiae* respectfully suggests either that the Court conduct the necessary evidentiary hearings, or that the matter be referred back to the special master to make such findings.

[5] There is a distinct difference between "islands" and "low tide elevations." An "island" is "a naturally formed area of land, surrounded by water, which is above water at high tide." Convention on the Territoral Sea and Contiguous Zone, Done at Geneva, 29th April, 1958 (hereinafter "Territorial Sea Convention"), 15 U.S.T. 1606; T.I.A.S. 5639, Article 10. A "low tide elevation" is "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide." Territorial Sea Convention, Article 11(1). These definitions have been adopted by the Supreme Court. *United States* v. *Louisiana*, 394 U.S. 11; 89 S. Ct. 773; 22 L. Ed. 2d 44 (1969). See, also, *United States* v. *California*, 382 U.S. 448; 86 S. Ct. 607; 15 L. Ed. 2d 517 (1966). *United States* v. *Ray*, 294 F. Supp. 532 (S.D. Fla., 1969). As will be demonstrated, important factual and juridical differences flow from the distinction between these two types of formations.

(a) *The 1740 Decree Does not Delimit the "Middle of the River" by Reference to Low Tide Elevations.*

The language of a judicial decree must be construed with reference to the facts on which the decree was based and the circumstances under which the language was used. 21 C.J.S., Courts, § 222, pp. 409-411; *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133; 65 S. Ct. 165; 89 L. Ed. 118 (1944); *The Grisbadarna Case*, note 2, *supra*, at 127. See also, *United States* v. *Wise*, 370 U.S. 405, 411; 82 S. Ct. 1354; 8 L. Ed. 2d 590 (1962). Therefore, as the special master concluded, the phrase "middle of the river" occurring in the 1740 Decree must be interpreted in accordance with the facts and circumstances existing in 1740. Report, pp. 40-42.

So far as the *amicus* has been able to determine, the low tide elevations in question are not shown on any chart or map published prior to, contemporaneous with, or within a reasonable time after the 1740 Decree.[6] As the special master concluded, "it cannot be said that uncharted 'rocky reefs' or later navigational aids could have played any part in the deliberations of the King and Commissioners." Report, p. 36.

The "middle of the river," which constituted the boundary between the states from and after the 1740 Decree, and which constitutes the boundary to this day, was therefore determined without reference to low tide elevations. Since the present river boundary is the one established by the 1740 Decree, it should not be drawn with reference to the low tide elevations, and neither, perforce, should the intersection of the middle of the river with the closing line of the harbor.

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[6] They do not appear on any such maps and charts submitted to the special master by the *Amici Curiae*.

(b) *The Median Line must be Measured from the Banks of the River and Not from Low Tide Elevations.*

The Supreme Court has established that the median line of a river is the line which is "midway between the main banks of the river." *Georgia* v. *South Carolina,* 257 U.S. 516, 523; 42 S. Ct. 173; 66 L. Ed. 347 (1922). In *New Jersey* v. *Delaware,* 291 U.S. 361, 379; 54 S. Ct. 407; 78 L. Ed. 847 (1934) the median line was described as the line "halfway between the banks." The median line was defined in *Arkansas* v. *Mississippi,* 250 U.S. 39, 43, 45; 39 S. Ct. 422; 63 L. Ed. 832 (1919) as "the line equidistant from the banks [of the river]." In 8 Opinions of the United States Attorney General 175, the Attorney General opined that the line of the middle of a river is the middle of the river bed, between the banks of the river.

That the median line is fixed by reference to the main banks of the river is universally supported by other authorities. See 1 McNair, Oppenheim's International Law (1928), p. 425; 2 Shalowitz, Shore and Sea Boundaries, (1964) p. 374, fn. 30.

It was recognized in *Georgia* v. *South Carolina,* 257 U.S. 516, 523; 42 S. Ct. 173; 66 L. Ed. 347 (1922), that in certain circumstances the bank on an island in the river may be used in determining the median line. However, this exception to the general principle has been applied only in the case of islands, and not in the case of low tide elevations.[7]

The measurement of the median line from the main banks of the river (or, where applicable, from islands in the river) applies the underlying theory of the median line principle: that each riparian state owns half of the water and bed of the river. Boggs, International Boundaries (1940), p. 180;

[7] For the important distinction between islands and low tide elevations, see note 5, *supra.*

Ingraham v. *Wilkinson,* 4 Pick. (21 Mass.) 268 (1826); *United States* v. *Elliott,* 131 F. 2d 720 (10th Cir., 1942). *Hardin* v. *Jordan,* 140 U.S. 371; 11 S. Ct. 808, 838; 35 L. Ed. 428 (1891); *Wisconsin* v. *Michigan,* No. 12, Orig., Supplemental Report of Special Master, 7 (the practice applies "the rule of equality of water area . . ."); Cukwurah, the Settlement of Boundary Disputes in International Law (1967), p. 50; Glos, International Rivers (1961), p. 110; 93 C.J.S., Waters, § 71, p. 745-746. The "river" is all of the water and the subsoil between its banks; Wisdom, The Law of Rivers and Watercourses (1962), p. 3; and the banks of the river border and enclose the river. *Oklahoma* v. Texas, 260 U.S. 606, 631; 43 S. Ct. 221; 67 L. Ed. 428 (1923). *Mammoth Gold Dredging Co.* v. *Forbes,* 104 P. 2d 131, 137 (Cal., 1940). *Seibert* v. *Conservation Commission of Louisiana,* 159 So. 375, 377 (La., 1935). Wisdom, *supra,* pp. 10-11, 38-40.[8]

In the instant case, the water flowing between Whaleback Reef and Gerrish Island is as much a part of the river as is the water between the reef and the New Hampshire bank. To measure the median line from low tide elevations in the reef, rather than from the banks of Gerrish Island or Wood Island, gives Maine much more than half of the river water, and New Hampshire much less. The same result obtains with respect to the river bed. Low tide elevations are a part of the river bed. *United States* v. *Ray,* 423 F. 2d 16, 20

[8] For reasons discussed *infra,* pp. 23-24, neither the low tide elevations in Whaleback Reef, nor the reef itself, can be considered part of the "bank" or shoreline of the river. Suffice it to note at this point that it does not border or enclose the river, that it is located almost one-third of the way into the river from the Maine shoreline, and that the waters between the reef and the Maine shoreline and adjacent islands are sufficiently deep, are navigable and in fact actively navigated, and are not inextricably linked to the mainland.

(5th Cir., 1970). 1 Shalowitz Shore and Sea Boundaries (1962), p. 228.[9] To measure a median line from a point in the bed, rather than from its edge (i.e., the banks of the river on the mainland or an island) has the obvious effect of giving Maine more than half of the bed and New Hampshire less than half.

The measurement of the median line from low tide elevations therefore does violence to the principle underlying the median line rule: that each riparian state should receive half the river and river bed. It produces a "distorted and anomalous" situation (Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea," 8 International and Comparative Law Quarterly 73, 85, fn. 30 (1959)), and violates "the major community policy at stake" with respect to boundary problems of opposite states: "that of achieving equitable apportionment." McDougal & Burke, Public Order of the Oceans (1962), p. 428. See also Pearcy, *supra*, note 3, at 16.

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[9] Other definitions of the bed of a river compel the conclusion that low tide elevations are a part of the bed. See *Oklahoma* v. *Texas*, 260 U.S. 606, 632; 43 S. Ct. 221; 67 L. Ed. 428 (1923):

"When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time"; *Alabama* v. *Georgia*, 64 U.S. 505, 515; 16 L. Ed. 412 (1859);

"[T]he bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." (This definition was also adopted in *Oklahoma* v. *Texas*, *supra*, at 631). In *United States* v. *Chicago, M., St. P., & P. R. Co.*, 312 U.S. 592, 597; 61 S. Ct. 772; 85 L. Ed. 1064 (1941), the bed was defined as "the lands below ordinary high water mark."

A former Geographer of the United States Department of State has squarely addressed the issue of whether a median line between opposite coasts may be drawn from offshore formations. Boggs, "Delimitation of Seaward Areas Under National Jurisdiction," 45 American Journal of International Law, 240, 257-258 (1951). He states,

> "Islands in a lake, gulf or bay may complicate the determination of the base line employed in laying down the median line. Because islands, large and small, are found both near and far out from coasts in water bodies of all sizes and shapes, it seems incontrovertible that *the median line should, as a general rule, be derived as nearly as proves feasible only from the mainland coast.* [Emphasis supplied.]
>
> "Obviously, some islands must be treated as if they were part of the mainland. The size of the island cannot in itself serve as a criterion as it must be considered in relation to its shape, orientation and distance from the mainland. The most reasonable and workable rule is believed to be to draw *that pair of parallel lines* tangent to opposite ends or sides of the island which encloses the *least area of water* between island and mainland. . . . Then, if the land area of the island (properly planimetered from the low tide shoreline) exceeds the water area bounded by the parallel lines, the island and mainland, the island should be reckoned as if part of the mainland base line, in laying down the median line. . . ." At p. 258. See the illustration at p. 257.

Although Boggs' analysis dealt with off-shore islands, his conclusions apply equally to low tide elevations. Such formations should be disregarded in drawing the median line unless they are so integrally related to the mainland as to constitute part of the coast.

(c) *The Low Tide Elevation in Whaleback Reef is Not Part of the Bank of the River.*

The line of the middle of the river is the line which is midway between the banks of the river. The term "banks" has been variously defined, but it is clear that the banks are the areas which border, enclose and confine the river. See 2 Shalowitz, *supra,* at 373, and the authorities there cited. See also, *Howard* v. *Ingersoll,* 17 Ala. 781 (1851); Wisdom, *supra,* 10-11. In no way can any of the low tide elevation in Whaleback Reef be said to border and enclose the river.

At issue here is whether these elevations should be assimilated to the bank of the river so as to be treated as part of the bank. They cannot be so treated. In *United States* v. *Louisiana,* 394 U.S. 11; 89 S. Ct. 773; 22 L. Ed. 2d 44 (1969) the Supreme Court considered whether certain islands could be considered the headlands of bays. 394 U.S. at 60-66.[10]

This depended on whether the islands in question were "so integrally related to the mainland that they are realistically part of the 'coast' . . ." 394 U.S. at 66.[11] In this connection the Court stated:

[10] The Court held that *in that context* there was no distinction between islands and low tide elevations. 394 U.S. at 60, fn. 80. In other words, if an island could be considered a headland, then so could a low tide elevation. The Court was careful to point out the difference between using a low tide elevation for drawing straight baselines (which is impermissible: see p. 30 et seq., *infra*) and considering it as a headland of a bay. The Court did *not* say, as is implied by the special master in the instant case (Report, p. 42, fn. 84), that there is in general no distinction between islands and low tide elevations; nor did it state that there is no such distinction for the purpose of drawing baselines. Indeed, the Court was careful to state quite the contrary.

[11] See also, 1 Shalowitz, *supra,* at 161, fn. 125: "The coastline should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland

> "While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast." 394 U.S. at 66.

The elevation at Whaleback Reef is small; in fact, it is merely the tip of a rock which protrudes at low tide. The same is true of every other elevation in the Reef.[12][13] The elevation therefore does not meet the size criterion in the above quotation from *United States* v. *Louisiana.*

The elevation used by the special master (point 3 on Appendix A) is nearly one-third of the way into the river as measured from the nearest point on the coastline of Gerrish

and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute island waters, or they form an integral part of a land form." Quoted at 394 U.S. at 65-66, fn. 85. (Emphasis in original.)

[12] As for the "elevation" on which the lighthouse sits, it appears that this is entirely man-made, consisting of rip-rap piled upon a previously submerged formation. Thus, it cannot be considered either an island or a low tide elevation, both of which must be "naturally formed." Territorial Sea Convention, Art. 10, 11 (1).

[13] The elevations in the Reef must be considered individually, rather than in relation to each other, in a "leapfrogging" manner, or as a unit. See *United States* v. *Louisiana,* No. 9, Orig., Report of Walter P. Armstrong, Jr., Special Master, p. 41. It is not the entire reef which is to be considered, but merely the individual rock or rocks which protrude at low tide. The "reef" consists of these individual rocks.

Island.[14] A formation this far into the river cannot be considered part of the bank of the river.[15]

The waters between the elevations in the reef and Gerrish Island (as well as the waters between the reef elevations and Wood Island) are up to eighteen feet deep, are navigable, and are in fact frequently navigated by vessels as large as 65 feet.[16] There is no inextricable and integral relationship between the waters and the shore. Finally, the elevations significantly depart from the general direction and curvature of the coastline on Gerrish Island.

The elevations in question, therefore, do not satisfy any of the criteria established by the Supreme Court in *United States* v. *Louisiana, supra,* for determining whether such

[14] The elevation in the reef which is nearest to Gerrish Island is one-fifth of the way into the river.

The elevations should be considered in relation to Gerrish Island, which forms the actual bank of the river, rather than in relation to other elevations, or to Wood Island. The issue is whether, because of proximity to the actual coastline, the elevation should be considered part of the coastline. To consider an elevation in relation to other off-shore formations would impermissibly extend the "coastline" to an illogical limit. See *United States* v. *Louisiana,* No. 9, Orig., Report of Walter P. Armstrong, Jr., Special Master, 41.

[15] A formation "must be considered in relationship to its shape, orientation and distance from the mainland." Boggs, "Delimitation Of Seaward Areas Under National Jurisdiction," 45 American Journal of International Law 240, 258 (1951); cited in *United States* v. *Louisiana,* 394 U.S. at 65, fn. 85.

[16] See Pearcy, "Geographical Aspects of the Law of the Sea," 49 Annals of the Association of American Geographers 1, 9 (1959) where the former Geographer of the United States Department of State explained that formations may be assimilated to the coast if they are "near [and] separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland." Such is not the situation in the instant case.

formations should be considered part of the coastline.[17] Moreover, they do not satisfy the test established by Boggs, quoted *supra* at p. 21, for determining whether a particular off-shore formation can be treated as part of the mainland for the purpose of drawing a median line. The area of the elevation at Whaleback Reef, and indeed, the area of the entire reef, is far less than the water area between the elevation or reef and the shore on Gerrish Island.

The elevation therefore cannot be treated as part of the river bank, and should be ignored in drawing the median line.

The conclusion of the special master that the median line may be drawn from low tide elevations should not carry with it the assumption that the special master implicitly made the necessary factual findings to support his conclusion. As stated in footnote 4, this issue first appeared as a footnote in the special master's report (Report, p. 42, fn. 84). It was never addressed by the parties, and no evidence was ever presented thereon. The special master's conclusion is based on his general assumption, which the *amicus* maintains is erroneous, that low tide elevations are juridically the same as islands, and in all cases can be used to draw a median line, regardless of whether the criteria established in *United States* v. *Louisiana, supra,* or set forth by Boggs, *supra,* have been met.

(d) *The Practice in Drawing Median Lines in Rivers has been to Ignore Low Tide Elevations.*

Median lines in boundary waters between states of the United States, and between countries, have in practice

[17] The special master in *United States* v. *Louisiana, supra,* note 12, using the criteria established by the Supreme Court in *United States* v. *Louisiana,* 394 U.S. 11, 66 (1969), concluded that certain low tide elevations along the Louisiana coast could not be assimilated to and treated as part of the mainland. See Report of Walter P. Armstrong, Jr., Special Master, 37, 38, 41, 52-53.

been drawn without reference to low tide elevations. The most recent example in this country is the boundary line in *Texas* v. *Louisiana,* No. 36. Orig. (1975). The special master in that case established as the boundary line in Sabine Lake and Sabine Pass, which divide Texas and Louisiana, "the median line marked on Louisiana Exhibits DDD and III. . . ."[18] Report of Special Master, p. 48. An examination of these exhibits and an analysis of the line therein, by plotting with dividers, reveals that the median line was measured from the actual banks of the lake and pass, without reference to offshore islands and marshes.

The proceedings in *Wisconsin* v. *Michigan,* No. 12 Orig. (1935), also demonstrate this practice. At issue in that case was the boundary line in Green Bay. The Supreme Court had previously concluded that the boundary was to be the geographic middle of the bay (*Wisconsin* v. *Michigan,* 295 U.S. 455, 462; 55 S. Ct. 786; 79 L. Ed. 1541 (1935)), and referred the case back to the special master for the purpose of drawing the line in accordance with the Court's decree. A chart was filed with the special master[19] on which were drawn two lines — one labeled "Nearest Land Method," and the other labeled "Mid-section Method." It is clear from an analysis of the "Nearest Land Method" line that this is the median line which is everywhere equidistant from the land (including islands) of the opposite states. It is the median line drawn in ac-

[18] These exhibits are kept in the storage area in the Supreme Court Building, in Box 7 of the Exhibits in *Texas* v. *Louisiana,* No. 36, Orig.

[19] War Department, Coast Chart No. 2, "West Shore of Lake Michigan," on file in the Cartography Division, National Archives, Washington, D.C.

cordance with the same principles which govern the instant case.

From analyzing and plotting this line with dividers, it is clear that it was drawn without regard to low tide elevations in the bay. The line was drawn without regard to Horseshoe Reefs off the Wisconsin coast, and goes directly through Whaleback Shoal, to the north of Horseshoe Reefs. The line was also drawn without regard to Eleven Foot Shoal, Corona Shoal, Minneapolis Shoal, North Drisco Shoal and Drisco Shoal, which are located in the vicinity of 45° 33′ North and 86° 58′ West, and St. Martin's Shoals, located in the vicinity of 45° 27′ North and 86° 46′ 20″ West. It is therefore apparent that this median line was drawn by measuring from the coastline on islands and the mainland, and that low tide elevations were ignored.

The "Mid-section Method" line equally divides the water area bordered by the banks on the mainland, and ignores islands in the bay. It is clear that this line too was drawn without regard to low tide elevations.

The boundary line reported by the special master in that case appears on War Department Chart No. 70, "North End of Lake Michigan," on file in the Cartography Division, National Archives, Washington, D.C.[20]

The special master noted, at page 8 of his Supplemental Report, that line BX on the Chart was "the exact geographical center of the bay" in that portion of the bay. An analysis of this line with dividers makes it clear that this line was drawn without regard to low tide eleva-

[20] A smaller copy appears at "Exhibit B" appended to Supplemental Report of Special Master, on file in the National Archives. The Supplemental Report of the special master was accepted by the Supreme Court at *Wisconsin* v. *Michigan,* 297 U.S. 547; 56 S. Ct. 166; 80 L. Ed. 388 (1936).

tions, particularly the "rock awash" located at 45° 5′ 30″ North and 87° 19′ 20″ West, near the Wisconsin coast. It also ignored Strawberry Islands to the northeast of the "rock awash." (Although the special master found that this line represented the exact geographical center of the bay, he could not adopt it as the boundary because it traversed Chambers Island, which belonged wholly to Wisconsin. He therefore adopted line BC as the boundary in that portion of the bay, point C being adjacent to point X).

The special master continued the boundary line in the bay by drawing line CK, point K being "practically in the center of the bay." (Supplemental Report of Special Master, p. 9). This is the case when that point is measured from the mainland, rather than from Strawberry Islands and Horseshoe Reefs, off the Wisconsin coast.

The special master next drew line KL, which he stated, at page 9, to be "almost exactly in the geographical center of the bay." This line represents the geographic median line measured from the mainland, without regard to Horseshoe Reefs and Whaleback Shoal.

The above cases demonstrate the practice in drawing median lines in rivers and inland waters between states to draw such lines by reference to the actual shore line on the mainland or islands, and to ignore low tide elevations.

This is also the practice in drawing international frontiers in boundary rivers. In the treaty between El Salvador and Guatemala, April 9, 1938, the median line in the rivers between the two countries was established as the boundary. United States Department of State, Office of the Geographer, International Boundary Study No. 82- El Salvador-Guatemala Boundary (1968). The official maps drawn by the Joint Frontier Commission pursuant

to and implementing the treaty show that the median lines were drawn midway between the banks, and ignored elevations in the rivers. See Mapas que Acompanan a Informe Rendido a los Respectivos Gobiernos por la Comision Mixta de Limites entre Guatemala y El Salvador (1942), especially Hoja No. 5- Secion de Suriano a Ocean Pacifico.

The frontier between France and Switzerland in Lake Geneva is the median line of the lake, which is "defined by the locus of the centers of circles enscribed between the Swiss and French banks." United States Department of State, Office of the Geographer, International Boundary Study No. 11, France-Switzerland Boundary (1961), p. 3.

It is clear, then, that in drawing median boundary lines in internal waters, these lines in practice are measured from the banks on the mainland or islands, and low tide elevations are ignored.

(e) *The Rule that Low Tide Elevations should be Ignored in Drawing the Median Line is Consistent with the Territorial Sea Convention.*

It has been explained that it is permissible to depart from the principle that the median line in a river is to be measured from the true banks of the river, and measure the line from off-shore formations, when, because of the geographic nature of the formation, its close proximity to the mainland, and the close affinity of the formation and the intervening waters to the mainland, the formation should be treated as part of the bank of the river. This principle is in accordance with rules established in the Territorial Sea Convention.

Article 3 of the Convention provides that "[e]xcept where otherwise provided in the Articles, the normal baseline for measuring the breadth of the Territorial Sea is

the low water line along the coast. . . ." This rule that the baseline (which is the line which divides internal waters and the Territorial Sea: Art. 5 (1)) must follow the actual coastline may be departed from in "localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. . . ." In such situations, straight baselines may be drawn between appropriate points. Art. 4(1). However, "[T]he drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." Art. 4(2). Moreover, it is specifically provided that straight baselines "shall not be drawn to and from low tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them." Art. 4(3).

The scheme in the Convention therefore permits a departure from the actual coastline when the geographic circumstances mentioned in Article 4(1) exist. But even when such geographic justification exists, specific baselines must be drawn in accordance with the criteria in Article 4(2) and (3). These criteria ensure that baselines will be drawn only to and from those points which are so integrally related to the mainland that they should realistically be considered part of the coast.

Low tide elevations are specifically excluded as points to and from which straight baselines may be drawn. The reason for this was explained by the International Law Commission in its Commentary to its Draft Article 5,[21] which was the basis of the convention Article 4:

[21] Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159), pp. 13-15. Draft Article 5 (1) provided that "baselines shall not be drawn to and from drying rocks and drying shoals." Id., at p. 14.

> "Straight baselines may be drawn to islands situated in the immediate vicinity of the coast but not to drying rocks and drying shoals. Only rocks or shoals permanently above sea level may be used for this purpose. *Otherwise the distance between the baselines and the coast might be extended more than is required to fulfill the purpose for which the straight baseline method is applied,* and, in addition, it would not be possible at high tide to sight the points of departure of the baselines." Commentary (8), p. 15. [Emphasis supplied.]

The Commission's point with respect to the portion italicized above is that when straight baselines are drawn to and from off-shore formations, the waters landward of the baselines become internal waters [Territorial Sea Convention, Art. 5(1)], and the nature of low tide elevations, and their relationship with the mainland, are not such as to justify creating such an extended zone of internal waters.

McDougal and Burke also explain that "it is not normally expected that [a low tide elevation] has any particular use to the local population; nor can it realistically be considered as a dependable landmark for interested mariners." Public Order of the Oceans (1962), p. 388.

It therefore appears that the rationale of the Convention prohibition of drawing straight baselines to and from low tide elevations is that such formations, being merely barren rocky points protruding at low tide, of no particular use to the local population, and unsatisfactory for use by mariners, are not so integrally related to the ac-

tual coast as to warrant departing from the coastline and extending internal waters to baselines drawn to and from the elevations. Nor are the waters between the elevations and the mainland sufficiently linked to the land domain to constitute internal waters.

For the same reasons, and by analogy to these convention principles, low tide elevations cannot be considered part of the coast for the purpose of drawing a median line.[22]

The conclusion of the special master in the instant case relative to the use of low tide elevations (Report, p. 42, fn. 84) is based upon an erroneous application of the precise Convention rules which govern the delimitation of the *Territorial Sea* between opposite coasts[23] to the establishment of the median line in *internal waters,* i.e. the river.[24]

[22] The existence of a lighthouse on one of the elevations in Whale-back Reef does not justify using this elevation as a point from which to measure the median line, since, for reasons explained in the previous section (that the criteria set forth in *United States* v. *Louisiana,* and by Boggs, were not satisfied) the elevation is not so integrally related to the bank of the river as to be treated as part of the bank.

[23] The relevant rules in the Territorial Sea Convention which the special master implicitly applied in the instant case are the following: *Article* 12(1): "Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured . . ." *Article* 11(1): "Where a low tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea."

[24] For a discussion of the factual and juridical differences between internal waters and the territorial sea, see *United States* v. *Louisiana,* 394 U.S. 11, 22 (1969). Waters on the landward side of the baseline of the territorial sea are internal waters [Territorial Sea Convention, Art. 5 (1)]; and the baseline of a river is the line drawn across its mouth between points on the low tide line of its banks [Territorial Sea Convention, Art. 13]. A river is part of a state's internal waters.

There is a distinction between applying the median line rule to the delimitation of river boundaries as opposed to territorial sea boundaries.

> "Because of the relationship between seaward boundaries not merely to the coastal States involved but to the international community which utilizes and depends upon the adjacent high seas, international law has specifically recognized different rules for delimiting the boundaries of the States adjacent to those waters." *Texas* v. *Louisiana,* No. 36, Orig., Brief for the United States in Response to Texas' Brief in Support of its Exceptions to the Report of the Special Master, filed September 15, 1975.

The International Law Commission recognized in its Commentary to its Draft Article 12, which was the basis for the Convention Article 12, that the rules therein "cannot be applied in all circumstances" and that internal waters could be subject to different rules. Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159), p. 18. The precise rules in Article 11 and Article 12 are meant to apply to offshore boundaries, and not necessarily to those in internal waters.

> "International boundaries to distinguish offshore sovereignty and rights are limited to those extending through the territorial sea and over the continental shelf. In internal waters any international boundaries

are integral parts of those of the adjoining land area, hence not definable as offshore." Pearcy, *supra* note 15, at p. 16.

The error made by the special master was to apply to the boundary in the Piscataqua River the rules that the outer limit of the territorial sea may be measured from low tide elevations within the territorial sea (Territorial Sea Convention, Art. 11(1)), and that therefore the median line *in the territorial sea* may be measured from these elevations (Art. 12(1)).[25] That low tide elevations may be used for drawing the median line in the territorial sea in no way implies that they can therefore be used for drawing the median line in internal waters. An analysis of Articles 11 and 12 reveals that the opposite is in fact the case. It will become clear in the ensuing discussion that the confusion, which has been recognized to exist by the International Law Commission itself and by other commentators,[26] arises from the "unfortunate" use of the phrase "as the baseline" in Article 11.[27]

[25] That this was the basis of the special master's conclusion is clear from his citation of Article 11 of the Territorial Sea Convention, which relates to the measurement of the territorial sea; *United States* v. *Louisiana*, 394 U.S. 11; 89 S. Ct. 773; 22 L. Ed. 2d 44 (1969); 420 U.S. 529 (1975), in which the issue also was the measurement of the breadth of the territorial sea; and the boundary studies by the United States Department of State, of which one involved a territorial sea boundary, and two concerned continental shelf boundaries (Report, p. 42, fn. 84) See pp. 43-44, *infra*.

[26] Report of the International Law Commission Covering the Work of its Sixth Session (1954), Gen. Ass. Off. Rec., 9th Sess., Supp. No. 9 (A/2693), p. 16; International Law Commission, Sixth Session, Summary Record of the 260th Meeting, U.N. Doc A/CN. 4/SR.260, p. 16 (per Francois, Rapporteur of the Session); Fitzmaurice, *supra* p. 20, at 87.

[27] Fitzmaurice, loc. cit. *supra* note 26.

The history of Article 11(1) reveals that its purport is that when a low tide elevation is located within a state's territorial sea as measured from the actual coastline, the elevation has its own territorial sea, and will thus cause a bulge in the territorial sea of the state.

An early version of Article 11 provided,

> "Elevations of the sea-bed which are only above water at low tide and are situated partly or entirely within the territorial sea shall be treated as islands for the purpose of determining the outer limit of the territorial sea." Francois, "Second Report on the Regime of the Territorial Sea," International Law Commission, Fifth Session (1953), U. N. Doc. A/CN. 4/61, p. 30, Art. 5(1).

The comment of the Rapporteur with respect to this provision stated that,

> "a distinction is drawn between islands and drying rocks. . . . [A]n island has its own territorial sea; *a drying rock is deemed to be an island for this purpose only if it is situated partly or entirely within the territorial sea extending along the coast.* A drying rock situated outside the territorial sea is not regarded as having its own territorial sea." [Emphasis supplied] Francois, *supra*, p. 33-34.

This Article was amended during the same session of the International Law Commission to read as follows:

> "Article 5: (1) As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast. . . . (3) Drying rocks and shoals that are exposed between the datum of the chart and high

water if within the territorial sea, *may be taken as individual points of departure for measuring the territorial sea, thus causing a bulge in the outer limit of the latter.*" [Emphasis supplied]. Francois, "Addendum to the Second Report on the Regime of the Territorial Sea," International Law Commission, Fifth Session (1953), U. N. Doc. A/CN. 4/61/ Add. 1, Art. 5, pp. 5-6.

Immediately following this provision was Article 5a, which permitted the drawing of straight baselines in areas where the coast was deeply cut into or where there were islands in its immediate vicinity, but stated that "baselines should not be drawn to and from drying rocks and shoals." Francois, "Addendum. . . ," *supra,* at p. 6. The distinction is therefore developing here between considering that low tide elevations within a state's territorial sea have their own territorial sea, thereby causing a bulge in the state's territorial sea (which was permitted), and using low tide elevations for drawing straight baselines and thereby extending internal waters (which was not permitted).

The following Articles appeared in later versions of the Draft:

> "*Article 11.* Every island has its own territorial sea. An island is an area of land surrounded by water which is permanently above high water mark. . . ."
> "*Article 13.* Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea."

> Francois. "Third Report on the Regime of the Territorial Sea," International Law Commission, Fifth Session (1954), U. N. Doc. A/CN. 4/77, p. 12-13.

The comment to Article 13 stated, at page 13:

> "A distinction has been made between islands and drying rocks. An island off the coast, even if situated outside the territorial sea, always possesses a territorial sea of its own. A drying rock is only deemed an island in this respect when situated wholly or partly within the territorial sea along the coast. A drying rock lying outside the territorial sea possesses no territorial sea of its own."

The following year, the International Law Commission re-drafted the relevant portion of its previous Article 5, and designated it Article 12:

> "Drying rocks and shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea." Report of the International Law Commission Covering the Work of its Sixth Session (1954), Gen. Ass. Off. Rec., 9th Sess., Supp. No. 9 (A/2693), p. 16.

The Commentary to this Article further explained it, and dealt with suggestions that it might be inconsistent with the rule in a previous article that straight baselines may not be drawn to and from drying rocks:

> "Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will accordingly make allowances for the presence of such drying rocks and will jut out to sea off the coast. Drying

rocks and shoals however which are situated outside the territorial sea have no territorial sea of their own.

"The Commission considers that the above Article expresses the international law in force.

"It was said that the terms of Article 5 (under which baselines are not drawn to or from drying rocks and shoals) might perhaps not be compatible within Article 12. The Commission does not consider them incompatible. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks are treated as islands in every respect. If they were, then, so far as the drawing of baselines is concerned, and in particular in the case of shallow waters off the coast, the distance between the baselines and the coast might conceivably be far in excess of that intended to be laid down by the method of these baselines." Report . . . ., *supra,* at p. 16.

Rapporteur Francois, who authored the Article, made the following significant comment:

> "The gist of [the Article] was that a drying rock within T miles of the coast (where T = breadth of the territorial sea) could serve to extend the territorial waters by causing a bulge in the outer limit of the latter. . . ." International Law Commission, Sixth Session, Summary Record of 260th Meeting (1954) U. N. Doc. A/CN. 4/SR. 260, p. 14.

As to whether this Article conflicted with the provisions regarding baselines, he stated, at page 16:

> "Article 13 embodied a general principle, whereas Article 6 referred to a special case.

> "Article 13 laid down the general rule *for measuring the territorial sea from the normal baseline,* namely the low water line. For that purpose, rocks emerging at low water were to be taken into account provided, of course, that they were less than T miles from the shore. Article 6 was concerned with the exceptional case in which a state, because of its deeply indented coast, was allowed the special privilege of simplifying the perimeter of its territorial sea by drawing straight baselines as an artificial substitute for the normal baseline (low water line) because the latter would be too sinuous. Its provisions were therefore framed restrictively. It forbade the drawing of straight baselines to and from the banks and rocks emerging only at low tide."

The Commentary to Article 11 stated:

> "Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own."

The Final Report of the International Law Commission [Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159)] contained the following provisions:

> "Baselines shall not be drawn to and from drying rocks and drying shoals." [Art. 5 (1); this eventually became Convention Art. 4(3)].

"Every island has its own territorial sea." [Art. 10; eventually Convention Art. 10 (2)].

"Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extension of the territorial sea." (Art. 11; eventually Convention Art. 11).

The Commentary to Article 11 stated, at p. 17:

"Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own."

These excerpts from the proceedings of the International Law Commission are set forth in detail in order to show conclusively the true meaning of Article 11, and its relationship to Articles 4 and 12. Article 11 expresses the principle that when a low tide elevation is situated within the territorial sea as measured from the actual coastline, it possesses its own territorial sea, and accordingly causes a bulge in the territorial sea of the coastal state. This principle is represented pictorially at 1 Shalowitz, *supra,* at p. 226, and 2 Shalowitz, *supra,* at pp. 379-380; and in Pearcy, *supra,* at p. 9. On the other hand it is quite clear that low tide elevations cannot cause an extension of internal waters. This is clear from Article 4, which prohibits the drawing of straight baselines to and from low tide elevations, and which permits internal waters

to be extended to other off-shore features only when such features are so integrally related to the coastline as to constitute a part thereof. As McDougal and Burke state,

"[T]he provision in Article 11 was not intended to authorize drawing of baselines from or to a drying rock or to create internal waters by the authorization contained in this Article." Public Order of the Oceans (1962), p. 394.

"What the Article authorized in this interpretation, was only extension of the outer limit of the territorial sea and this does not require laying down baselines. *Nor does it necessitate regarding areas landward of the drying rocks as internal waters.* This appears to have been the result sought by the [International Law] Commission." (Emphasis supplied.) Ibid., at p. 394, fn. 237.

"[Article 11] deliberately emphasizes that the purpose of using the drying rock was to affect the outer limit of the territorial sea and not to create new areas of internal waters." Ibid., p. 396.

Article 12, which sets forth the rules for drawing the median line in the territorial sea, must be interpreted in this context. This article, read together with Article 11(1), states that the median line *in the territorial sea* may be measured from those low tide elevations which are located within the territorial sea of the coastal state as measured from the actual coastline. *This is because low tide elevations so situated are deemed to possess their own territorial sea,* and cause an outward bulge in the coastal state's territorial sea. Therefore, in drawing a median line in territorial waters between opposite states, when there exist low tide elevations within the breadth

of the territorial sea as measured from one coast, the line must be drawn so as to take into account the territorial sea possessed by the elevation, and the consequent extension of the coastal state's territorial sea.[28] In short, the median line divides the territorial sea of the low tide elevation and that of the opposite coast.

The same does not apply in internal waters, such as the river. Low tide elevations do not possess their own internal waters; and it has been shown that they cannot extend internal waters. There is no zone of internal waters appertaining to low tide elevations, and no bulge in the coastal state's internal waters, which must be taken into account in drawing the median line. In fact, to measure the median line from such elevations in internal waters

[28] This principle was contained in earlier versions of Article 12: "An international boundary between countries the coasts of which are opposite each other at a distance of less than 2T miles (T being the width of the territorial sea) should as a general rule be the median line, every point of which is equidistant from the baselines of the States concerned. Unless otherwise agreed between the adjacent States, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of both States, should be disregarded in laying down the median line. . . ." Francois, "Addendum to the Second Report on the Regime of the Territorial Sea," International Law Commission, Fifth Session, U.N. Doc. A/CN.4/61/Add. 1, p. 8.

Elevations of undetermined sovereignty within the breadth of the territorial sea from both states are disregarded because, being so situated, they extend the territorial sea of *both* opposite states, and thus cancel out any effect on the median line.

This detailed wording was eventually amended to produce the more general version of Article 12 because the Commission felt "that the provision should not be too detailed but should retain a certain latitude." Report of the International Law Commission Covering the Work of its Sixth Session (1954), Gen. Ass. Off. Rec., 9th Sess., Supp. No. 9 (A/2693), p. 17.

implies that they do extend internal waters, which is contrary to the Territorial Sea Convention.

(f) *The Authorities Cited by the Special Master do Not Support his Conclusions.*

Many of the authorities cited by the special master (Report, p. 42, fn. 84) to support his conclusion that the median line in the river may be measured from low tide elevations have been discussed in previous sections and distinguished from the instant case. None of the sources cited justify such a conclusion.

The work by Boggs, International Boundaries: A Study of Boundary Functions and Problems (1940) nowhere states that the median line in internal waters may be measured from low tide elevations. Similarly, Shalowitz contains nothing to this effect. In fact, both of these authorities indicate quite the contrary. The case of *United States* v. *Louisiana*, 394 U.S. 11; 89 S. Ct. 773; 22 L. Ed. 2d 44 (1969) has been distinguished above (see *supra*, note 10).

Finally, the boundary studies by the United States Department of State deal with the territorial sea and continental shelf, and as explained above, the precise rules governing the delimitation of these areas do not apply to internal waters. Moreover, "the Abu Dhabi — Qatar [boundary] was not delimited according to the strict application of equidistance principles." U.S. Department of State, Office of the Geographer, International Boundary Study, Series A, No. 18, Continental Shelf Boundary: Abu Dhabi — Qatar, p. 3. Also, the Bharain — Saudi Arabia continental Shelf Boundary was fixed by agreement of the parties, rather than by strict application of the continental shelf equidistance principle, and this delimitation ignored

small islands between the coasts. U.S. Department of State, Office of the Geographer, International Boundary Study, Series A, No. 12, Continental Shelf Boundary: Bharain — Saudi Arabia, p. 3.

V. The Special Master Erred in Determining the Geographic Median Line in Gosport Harbor.

The special master concluded that the middle of Gosport Harbor is also the geographic median line. Report, p. 43. However, he mistakenly determined the point of intersection of this median line with the closing line of the harbor by bisecting the closing line, rather than by finding the point on that line which is equidistant from the nearest points on the opposite sides.[29] This latter method is the one used by the special master to find the intersection point on the closing line of Portsmouth Harbor, and is the method approved by the authorities cited *supra* in footnote 3. By this method, the intersection point is at point E, which is slightly northeasterly of the point reported by the special master. Point E is equidistant from points F and G, the latter two being the points on the opposite sides which are nearest to point E.

[29] The *amicus* suspects that this was an inadvertent oversight by the special master. In an early draft of the Report of the Special Master, the intersection point in the closing line of Portsmouth Harbor was determined by bisecting that line. This method was later abandoned in favor of the method used in the Report, which is the method approved by the authorities cited in footnote 3, *supra*. The *amicus* suspects that the special master inadvertently neglected to make the same change in the closing line of Gosport Harbor.

Conclusion.

The Lateral Marine Boundary Between New Hampshire and Maine.

The "lights on range" line, urged by the *amicus curiae*, is depicted on Appendix A.

The line labeled "Alternative 1" is the line connecting the intersection of the median line in the Piscataqua River and the Frost Point-Gerrish Island closing line with the relevant point on the closing line of Gosport Harbor determined as explained in the previous section. "Alternative 2" is the line connecting the intersection of the median line in the Piscataqua River with the harbor closing line reported by the special master and the analogous point in Gosport Harbor. The river median line in Alternatives 1 and 2 has been determined without reference to low tide elevations.

The line labeled "special master" is the line reported by the special master in this case.

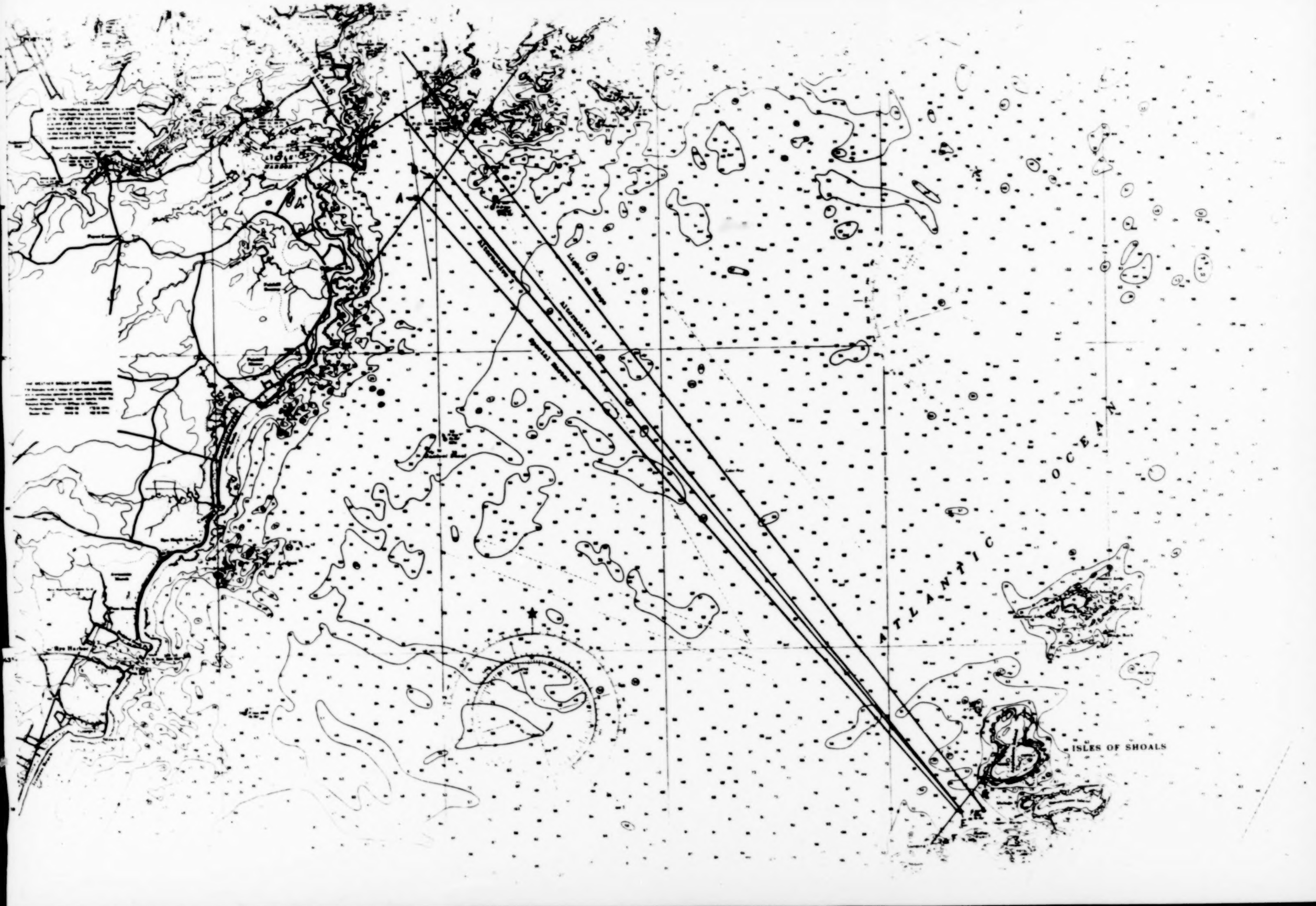
Respectfully submitted,

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Appendix A.

United States Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Survey, C & GS Chart 211, "Portsmouth Harbor: Cape Neddick Harbor to Isles of Shoals."

The original of this chart is filed separately with the Clerk of the Supreme Court of the United States.


Alternative 3
Lights on Range
Alternative 1
Special Marker
ATLANTIC
OCEAN
ISLES OF SHOALS